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Missouri Products Liability Law Revisited: A Look at Missouri Strict Products Liability Law before and after the Tort Reform Act

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MISSOURI PRODUCTS LIABILITY LAW REVISITED: A LOOK AT MISSOURI STRICT PRODUCTS LIABILITY LAW BEFORE AND AFTER THE TORT REFORM ACT

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I. INTRODUCTION

The Missouri Supreme Court in *Keener v. Dayton Electric Manufacturing Company*[1] adopted the Restatement (Second) of Torts Section 402A (1965) version of strict products liability for products unreasonably dangerous as manufactured. In *Blevins v. Cushman Motors*,[2] the court extended the theory to permit recovery for injuries caused by a product unreasonably dangerous as designed.[3] Almost ten years later in *Nesselrode v. Executive Beechcraft, Inc.*,[4] the court recognized an action for failure to warn based on the theory of strict products liability. The court adopted strict products liability:

> to insure that the costs of injuries resulting from defective products are borne by the manufacturers [and sellers] that put such products on the market

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1. 445 S.W.2d 362 (Mo. 1969).

2. 551 S.W.2d 602 (Mo. 1977) (en banc).

3. The court stated that "there is no rational distinction between design and manufacture in this context, since a product may be equally defective and dangerous if its design subjects protected persons to unreasonable risks as if its manufacture does so." *Id.* at 607 (quoting Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 475, 467 P.2d 229, 236, 85 Cal. Rptr. 629, 636 (1970) (en banc)). Before *Blevins*, the court had reviewed cases submitted on a strict products liability defective design theory, but had not explicitly extended the theory to a defective design case. *See, e.g.*, Lietz v. Snyder Mfg. Co., 475 S.W.2d 105 (Mo. 1972). The courts of appeal also had recognized that defective design cases were cognizable under the theory of strict products liability. *See, e.g.*, Higgins v. Paul Hardeman, Inc., 457 S.W.2d 943 (Mo. Ct. App. 1970); *see also* Hoppe v. Midwest Conveyor Co., Inc., 485 F.2d 1196 (8th Cir. 1973) (construing Missouri law).

4. 707 S.W.2d 371 (Mo. 1986) (en banc). Before the *Nesselrode* decision, the supreme court had approved a jury instruction based on strict products liability for failure to warn. M.A.I. 25.05 (1981). Courts of appeal also had applied strict products liability for failure to warn. *E.g.*, Duke v. Gulf & Western Mfg. Co., 660 S.W.2d 404, 418 (Mo. Ct. App. 1983); Racer v. Utterman, 629 S.W.2d 387, 393 (Mo. Ct. App. 1981), *cert. denied sub nom.*, Racer v. Johnson & Johnson, 459 U.S. 803 (1982).

rather than by the injured persons who are powerless to protect themselves.[5]

Since the *Keener* decision, the Missouri Supreme Court has reviewed or commented on this theory on only a few occasions.[6] These decisions have left unanswered many questions on the scope and nature of strict products liability. This legal uncertainty has created problems as to the affordability and availability of products liability insurance. In an effort to eliminate the legal uncertainty and to solve the perceived insurance crisis, the Missouri General Assembly recently passed the Missouri Tort Reform Act (the "Act").[7] In some areas, the Act will have little or no impact on Missouri strict products liability law in that it does not change the law. On other issues, it makes changes which are unworkable or significantly modify existing strict products liability law.

This Article will discuss the status of strict products liability law in Missouri before passage of the Act.[8] It will focus on the elements and standards of a strict products liability action, on issues of causation and comparative fault, on the issue of joint and several liability, and on questions regarding choice of law and the statute of limitations. A better understanding of these issues and of the Act's effect on existing law should lead to a more uniform application of the strict products liability theory to future cases.

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5. *Blevins*, 551 S.W.2d at 606-07 (quoting Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969) (quoting Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963))).

6. *See, e.g.*, Fahy v. Dresser Indust., Inc., 740 S.W.2d 635 (Mo. 1987) (en banc); Bhagvandoss v. Beiersdorf, Inc., 723 S.W.2d 392 (Mo. 1987) (en banc); Barnes v. Tools & Mach. Builders, Inc., 715 S.W.2d 518 (Mo. 1986) (en banc); Lippard v. Houdaille Indus., Inc., 715 S.W.2d 491 (Mo. 1986) (en banc); Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371 (Mo. 1986) (en banc); Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434 (Mo. 1984) (en banc); Aronson's Men's Stores v. Potter Elec., 632 S.W.2d 472 (Mo. 1982) (en banc); Blevins v. Cushman Motors, 551 S.W.2d 602 (Mo. 1977) (en banc); Lewis v. Bucyrus-Erie, Inc., 622 S.W.2d 920 (Mo. 1977) (en banc); Means v. Sears, Roebuck & Co., 550 S.W.2d 780 (Mo. 1977) (en banc); Giberson v. Ford Motor Co., 504 S.W.2d 8 (Mo. 1974); Lietz v. Snyder, 475 S.W.2d 105 (Mo. 1972), Katz v. Slade, 460 S.W.2d 608 (Mo. 1970).

7. The Act states:

> Section C. Because immediate action is necessary to restore the affordability and availability of liability insurance this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect on July 1, 1987, or upon final passage and approval, whichever later occurs.

H.B. No. 700, 84th General Assembly, First Regular Session (April 1987) (hereinafter "H.B. 700") (section C was subsequently dropped).

8. The Act only applies to actions accruing after July 1, 1987. Section C, H.B. 700. Accordingly, courts will continue to apply existing strict products liability law to cases accruing before July 1. In addition, the courts will continue to apply existing law when interpreting the Act.

II. NATURE OF A STRICT PRODUCTS LIABILITY CASE

The Missouri Supreme Court recently discussed the nature of strict products liability in Missouri in *Nesselrode v. Executive Beechcraft, Inc.*[9] The court stated that "the focal point of the litigation process is the condition or character of the product and not the character of the defendant's conduct—thereby excising the concept of reasonable care, the limits test of liability in negligence law, from Missouri's rule of strict tort liability."[10] At the same time, the *Nesselrode* court stressed that "the manufacturer is not an insurer for all injuries caused by his product."[11] These statements had been made in earlier Missouri decisions,[12] but the *Nesselrode* court set out the decisional framework from which lower courts and litigants should proceed in resolving future strict products liability cases.

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9. 707 S.W.2d 371 (Mo. 1986) (en banc).

10. *Id.* at 375. In *Blevins*, the court had noted the "important distinction" between negligence and strict liability focuses on foreseeability. In negligence, "the duty owed is based on the foreseeable 'or reasonable anticipation that harm or injury is a likely result of acts or omissions.' " *Blevins*, 551 S.W.2d at 607 (quoting Hull v. Gillioz, 344 Mo. 1227, ____, 130 S.W.2d 623, 628 (1939)). Strict liability in tort, the *Blevins* court explained, is based *in part* "on the foreseeability or 'reasonably anticipated' use of the product. . . ." *Blevins*, 551 S.W.2d at 607 (citing Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362, 366 (Mo. 1969)). *Nesselrode* highlights another aspect of the inquiry, the condition or character of the product.

11. *Id.* (quoting Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 37 TENN. L. REV. 363, 366-67, (1965)). One commentator questions whether "the means sanctioned for determining whether a defect exists and for imposing liability after a defect has been found" has blurred the distinction between strict products liability and "absolute liability." Comment, *Strict Products Liability: Missouri Moves Toward Absolute Liability*, 55 U.M.K.C. L. REV. 434, 435 (1987) (hereinafter *Absolute Liability*). He worries that Missouri courts' reliance upon "loss spreading" as the rationale for strict products liability has caused them to approach "absolute liability" in products liability cases. *Id. passim.* While this concern may be justified, it fails to account for the common law development of safeguards to avoid imposition of absolute liability. This Article discusses the common law and statutory development of Missouri strict products liability law. It will comment on or suggest changes in the evolution of Missouri strict products liability law to ensure that absolute liability is not imposed on product manufacturers and sellers.

12. For example, courts had stated that strict products liability eliminates proof of a violation of the standards of reasonable care. Blevins v. Cushman Motors, 551 S.W.2d 602, 607 (Mo. 1977) (en banc); Cryts v. Ford Motor Co., 571 S.W.2d 683, 688 (Mo. Ct. App. 1978). Conversely, courts had emphasized that "[s]trict liability does not equate with absolute liability," Rogers v. Toro Mfg. Co., 522 S.W.2d 632, 637 (Mo. Ct. App. 1975), and that "[a] manufacturer is not an insurer nor must he create a product which is accident proof," Brawner v. Liberty Indus., Inc., 573 S.W.2d 376, 377 (Mo. Ct. App. 1978); *see also* Laney v. Coleman, Inc., 758 F.2d 1299, 1302 (8th Cir. 1985) (construing Missouri law); Grady v. American Optical Corp., 702 S.W.2d 911, 916 (Mo. Ct. App. 1985). "The law merely imposes on [a] defendant the burden of designing and constructing [a] reasonably safe [product]. . . ." Braun v. General Motors Corp., 579 S.W.2d 766, 771 (Mo. Ct. App. 1979); *see also* Hurt v. General Motors Corp., 553 F.2d 1181, 1184 (8th Cir. 1977) (construing Missouri law).

A negligence action focuses on the reasonableness of the defendant's conduct. The parties litigate "the reasonableness of the manufacturer's actions in designing and selling the article as he did."[13] "[T]he duty owed is based on the foreseeable 'or reasonable anticipation that harm or injury is a likely result of acts of omissions.' "[14] A defendant's ability to know whether harm will result from use of its product is an essential element of a plaintiff's claim.

The primary inquiry in a strict products liability case is whether the product creates an unreasonable risk of danger to the consumer or user when put to a reasonably foreseeable use.[15] Foreseeability of harm is not an element of the claim. In a manufacturing defect case, if the product is not manufactured according to design specifications and it, as manufactured, creates an "unreasonable risk of danger" when put to a reasonably anticipated use, the defendant would be liable for any damages caused by the manufacturing defect.

If the product which conforms to its intended design nonetheless creates an "unreasonable risk of danger" which could have been remedied by an adequate warning, but none was given, the defendant would be liable for any damages caused by the failure to provide an adequate warning. If the product conforming to its intended design creates an "unreasonable risk of danger" that could not have been remedied by a warning, the defendant would be liable for any damages caused by a plaintiff's foreseeable use of such a "defective" product.[16] A manufacturer is not liable for all injuries caused by use of a

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13. *Blevins*, 551 S.W.2d at 608 (quoting Phillips v. Kimwood Mach. Co., 269 Or. 485, 494, 525 P.2d 1033, 1037 (1974) (en banc)).

14. *Id.* at 607. (quoting Hull v. Gillioz, 344 Mo. 1227, ____, 130 S.W.2d 623, 628 (1939) and citing Taylor v. Hitt, 342 S.W.2d 489, 494 (Mo. Ct. App. 1961)).

15. *Nesselrode*, 707 S.W.2d at 375. In Giberson v. Ford Motor Co., 504 S.W.2d 8, 12 (Mo. 1974), the supreme court "extend[ed] any right flowing from the 'rule of strict liability in tort' adopted in *Keener v. Dayton Electric Manufacturing Company, supra* to include a bystander." The court reasoned that:

> If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of the bystanders.

Id. at 10 (quoting Elmore v. American Motors Corp., 70 Cal.2d 578, 586, 451 P.2d 84, 88, 75 Cal. Rptr. 652, 656 (1969)). The Act does not change the case law extending liability to bystanders.

16. Courts and litigants often fail to recognize that a verdict in favor of the plaintiff on the theory of strict products liability for design defect and failure to warn are inconsistent. A product cannot be defectively designed if the jury finds the defendant liable for failing to warn adequately. A case based upon liability of the manufacturer for failing to provide adequate warnings assumes that an adequate warning would have prevented the accident by remedying the unreasonably dangerous condition of the

product; it is liable only for injuries caused by the unreasonably dangerous condition or character of the product when put to a reasonably foreseeable use.[17]

The Act should not change this decisional framework. The elements of a strict products liability claim are essentially the same under the Act.[18] The

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product. A defendant faced with a finding of liability both on a plaintiff's submission of an instruction on design defect and an instruction based on failure to warn should request clarification from the jury so that the issue will be preserved for appeal. Douglass v. Safire, 712 S.W.2d 373, 374 (Mo. 1986) (en banc); *see infra* notes 112-19 and accompanying text.

17. In Sharp Bros. Contracting Co. v. American Hoist & Derrick Co., 703 S.W.2d 901, 903 (Mo. 1986) (en banc), the supreme court also held that the theory of strict products liability, "as a matter of policy, [does not apply] where the only damage is to the product sold," declining to follow the *dicta* in Crowder v. Vandendeale, 564 S.W.2d 879, 881 (Mo. 1978) (en banc); *see also* Clevenger & Wright Co. v. A.D. Smith Harvestore Prod., Inc., 625 S.W.2d 906, 909 (Mo. Ct. App. 1981) (strict products liability not appropriate remedy for damage to product itself).

Where the loss sustained is economic only, strict products liability also does not apply. Forrest v. Chrysler Corp., 632 S.W.2d 29, 31 (Mo. Ct. App. 1982); *see also Sharp Bros.*, 703 S.W.2d at 904 (Higgins, J., dissenting); *Clevenger & Wright Co.*, 625 S.W.2d at 909 (strict liability in tort is not the appropriate remedy for these economic and consequential damages). Remedies provided by the Uniform Commercial Code apply. *Id. But cf.*, Hales v. Green Colonial, Inc., 400 F.2d 1015, 1021 (8th Cir. 1974) (construing Missouri law) (loss of profits as a result of the tortious destruction of the plaintiff's business was foreseeable and, thus, compensable).

The Act arguably eliminates these limitations. The Act defines the term "products liability claim" as "a claim or portion of a claim in which the plaintiff seeks relief in the form of damages on a theory that the defendant is strictly liable for such damages. . . ." MO. REV. STAT. § 537.760 (Supp. 1987). It does not deny recovery where damages sought are for damages to the product sold or for economic damages. In addition, because MO. REV. STAT. § 537.765 (Supp. 1987) allows the jury to reduce recovery for "failure to mitigate damages," a defense to recovery under the Uniform Commercial Code (hereinafter "U.C.C."), a court would have some basis for concluding that the legislature intended to extend strict products liability to cases involving damage to the product and to cases seeking economic damages caused as a result of the defective unreasonably dangerous condition of the product.

The better interpretation would be that the legislature did not intend to eliminate the limitations established by the courts. First, the purpose of the Act was to reduce liability insurance costs. To extend liability would not reduce insurance costs. Second, by not explicitly stating that the Act allows recovery for damages to the product sold and for economic damages, better statutory interpretation would be that the Act intended to incorporate the prior case law into the definition of the term "products liability claim". *See also infra* note 18 and accompanying text. Finally, the U.C.C., MO. REV. STAT. chap. 400 (1986) provides a comprehensive statutory scheme for recovery of economic loss caused by failure of a product to perform as impliedly or expressly warranted. The legislature would not have eliminated this statutory scheme without expressly amending it.

18. The Act defines a strict products liability action as follows:

> a claim or portion of a claim in which plaintiff seeks relief in the form of damages on theory that a defendant is strictly liable in tort for such damages because:
>
> (1) The defendant, wherever situated in the chain of commerce, trans-

plaintiff must prove that the product was in a defective unreasonably dangerous condition when used in a manner reasonably anticipated or "reasonably foreseeable." The Act thus recognizes that the manufacturer is not an insurer for all injuries caused by one of its products: the concepts of unreasonable risk of danger and foreseeability are retained. From a theoretical and practical standpoint, Missouri courts will look to prior case law for guidance in interpreting and resolving unanswered questions presented by the Act.

III. Elements of a Strict Products Liability Case

In Missouri, jury instructions are approved by the supreme court through an administrative process.[19] These approved instructions have the same weight as principles adopted in a court's opinion and must be used when applicable.[20] Thus, the approved instructions serve as a starting point for a detailed analysis of Missouri strict products liability law.

A. *Seller in the Business of Selling the Product*

The first element of any strict products liability case accruing before the Act's effective date requires proof that the defendant sold the product in question and was engaged in the business of selling the product.[21] This element is

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ferred a product in the course of his business; and

(2) The product was used in a manner reasonably anticipated; and

(3) Either or both of the following:

(a) The product was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use, and the plaintiff was damaged as a direct result of such defective condition as existed when the product was sold; or

(b) The product was then unreasonably dangerous when put to a reasonably anticipated use without knowledge of its characteristics, and the plaintiff was damaged as a result of such defective condition as existed when the product was sold.

Mo. Rev. Stat. § 537.760 (Supp. 1987).

19. Mo. R. Civ. P. 70.

20. Mo. R. Civ. P. 70.02. *E.g.*, Eckert v. Dishon, 617 S.W.2d 649, 650 (Mo. Ct. App. 1981); McGowan v. Hoffman, 609 S.W.2d 160, 164 (Mo. Ct. App. 1980).

21. M.A.I. 25.04 (1981) "is intended for use in cases involving a manufacturing defect and in cases involving a design defect." M.A.I. 25.04 Committee's Comment (1978 Revision). It provides:

Your verdict must be for plaintiff if you believe:

First, defendant sold the (describe product) in the course of defendant's business; and

Second, the (describe product) was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use, and

Third, the (describe product) was used in a manner reasonably anticipated, and

Fourth, plaintiff was damaged as a direct result of such defective condition as existed when the (describe product) was sold.

M.A.I. 25.05 (1981) applies to a failure to warn case based upon strict products liabil-

basically lifted from the language of Section 402A of the Restatement (Second) of Torts (1965).[22] The comments to the Restatement and case law define a "seller" to include a manufacturer, wholesaler, distributor and retailer.[23] In *Katz v: Slade*,[24] the Missouri Supreme Court left unanswered the issue of whether a "commercial lessor" of a product may be liable as a "seller" under the theory of strict products liability.

In *Katz*, the plaintiff was injured while using a golf cart leased to him by a municipally-owned golf course. The supreme court declined to extend the doctrine of strict products liability under the circumstances of the case to include defendants which do not undertake "the mass leasing of [products] as a part of the overall marketing enterprise. . . ."[25] At the same time, the court discussed favorably cases from other jurisdictions which extended the class of defendants liable under the theory of strict products liability to include "commercial lessors."[26]

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ity. It provides as follows:

> Your verdict must be for plaintiff if you believe:
> First, defendant sold the (describe product) in the course of defendant's business, and
> Second, the (describe product) was then unreasonably dangerous when put to a reasonably anticipated use without knowledge of its characteristics, and
> Third, defendant did not give an adequate warning of the danger, and
> Fourth, the product was used in a manner reasonably anticipated, and
> Fifth, plaintiff was damaged as a direct result of the (describe product) being sold without an adequate warning.

The first requirement in a strict products liability case whether based on manufacturing defect, defective design or failure to warn requires that the defendant have sold the product in the course of its business.

22. THE RESTATEMENT (SECOND) OF TORTS (1965) provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not brought the product from or entered into any contractual relation with the seller.

Id. § 402A.

23. *E.g.*, Blevins v. Cushman Motor Co., 551 S.W.2d 602 (Mo. 1977) (en banc) (manufacturer and designer); Means v. Sears, Roebuck & Co., 550 S.W.2d 780 (Mo. 1977) (en banc) (retailer); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969) (wholesaler); Lewis v. Envirotech Corp., 674 S.W.2d 105 (Mo. Ct. App. 1984) (distributor). The defendant must be in the business of selling or distributing the product. A person re-selling a product he had purchased for his own use is not liable in strict products liability. He "had not purchased the [product] in question for the purpose of resale or distribution in the stream of commerce." Yokum v. Piper Aircraft Corp., 738 S.W.2d 145, 147 (Mo. Ct. App. 1987).

24. 460 S.W.2d 608 (Mo. 1970).

25. *Id.* at 613.

26. *Id. passim.*

The court noted that those cases involving leases that were made "in the course of active, full-time marketing as a part of a going business and not on a casual basis."[27] The court emphasized that the cases involved "typical commercial-type lessors engaged in the business of distributing goods to the public."[28] The court concluded that in those cases, as distinguished from the facts of the *Katz* case, the lessors were "an integral part of the overall . . . marketing enterprise that should bear the cost of injuries resulting from defective products," and were in a position to recover the cost of protecting the public by increasing their rental prices.[29]

By distinguishing the facts of *Katz* from those in the cases extending strict products liability theory to include commercial lessors, the court did not address the question of whether it would extend liability to commercial lessors which are "an integral part of the overall . . . marketing enterprise." The statements in *Katz*, however, would certainly support extension of the theory to commercial lessors. *Gabbard v. Stephenson's Orchard, Inc.*[30] subsequently extended the class of defendants liable under the doctrine of strict products liability to include a "bailor or lessor of a defective product in the usual course of its business. . . ."[31]

In *Gabbard*, plaintiff read a newspaper advertisement inviting the public to pick apples at Stephenson's Orchard. The defendant supplied ladders to members of the public so that they could pick apples out of the trees in the orchard. Plaintiff was injured when the ladder he was using tipped over and he fell to the ground. Plaintiff contended he should be permitted to recover under the theory of strict products liability enunciated in *Keener*. The trial court directed verdict for the defendant, concluding that *Katz* precluded plaintiff's recovery under the theory of strict products liability.[32]

The court of appeals reversed, holding that the doctrine of strict products liability applied.[33] The *Gabbard* decision has greater implications than exten-

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27. *Id.* at 612.

28. *Id.*

29. *Id.* (quoting McClaflin v. Bayshore Equip. Rental Co., 274 Cal. App. 2d 446, 452, 79 Cal. Rptr. 337, 340 (1969)).

30. 565 S.W.2d 753 (Mo. Ct. App. 1978).

31. *Id.* at 757.

32. *Id.* at 756.

33. The court explained its rationale for extending the doctrine:

> The accomplishment of the Restatement's stated objectives and the protection which flows therefrom is not dependent upon a 'sale.' To limit the rule to only those situations in which there has been an actual sale would be to circumscribe the rule to such an extent that its purpose might be defeated. The label gratuitous furnishing, is not of great significance; the nature of the transaction serves as the basis of strict liability in tort and not the name by which it is called. In protecting the consumer, the rule of strict liability in tort attaches to products which are placed in the stream of commerce.

Id. at 758 (quoting Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 114-17, 258 N.E.2d 681, 686-88 (1970)). While it consistently relates the *Katz* rationale for extension of the doctrine to commercial lessors, it does not focus upon the type of

sion of the theory to a "commercial lessor" of a product causing injury, because the defendant in *Gabbard* did not lease the product causing the plaintiff's injury. Rather, the defendant in *Gabbard* provided the ladder for use by others in picking apples. Providing the ladder did not constitute a "sale" or commercial lease of the ladder. The *Gabbard* court justified its decision by focusing upon the type of business—a profit-making enterprise—rather than upon the nature of the transaction. The court emphasized that Stephenson's advertised to make a profit, that it had a profit motive and that furnishing ladders was "interwoven with its sale of apples."[34] The court did not discuss or analyze whether the ladder had been placed on the market by Stephenson's.

This type of transaction would not appear to involve the type of commercial lease which places a leased product "in the stream of commerce not unlike a manufacturer or retailer" as discussed in *Katz*. The *Katz* Court emphasized that strict products liability might be extended to include as a defendant the "typical commercial-type lessors engaged in the business of distributing goods to the public." It stressed the type of transaction, not the profit motive of the defendant, in discussing whether to include the municipally-owned golf course in the class of defendants liable under the theory of strict products liability. Indeed, the court in *Keener* instructs that the purpose of strict products liability is to insure that the costs of injury are borne by those that *put* such products on the market. Extending the doctrine to include commercial lessors as defendants is consistent with the theory. A commercial lessor places the product on the market as if it were a manufacturer or seller.

Gabbard misconstrues *Katz* and would make any profit-making business strictly liable for any injury caused by a product used in its business. For example, if an escalator in a department store were found to be defective and unreasonably dangerous and caused an injury to a business invitee, a store owner arguably would be strictly liable for the plaintiff's injury under the *Gabbard* rationale. The store owner's knowledge of the dangerous condition and its care in attempting to prevent injuries would be irrelevant; the only injury would be whether the escalator was in a defective condition unreasonably dangerous and whether the customer was injured by the defective condition. To extend liability to this type of situation would not promote the purposes of strict products liability, because the store owner in such a situation was not engaged in the business of distributing, selling or leasing escalators to the public. He cannot factor in the costs of injuries in its sale of escalators, because he does not sell escalators. In fact, the store owner would be the "user" of the product.

While not reviewing the *Gabbard* decision nor any other decision raising the issue, the Missouri Supreme Court in *dicta* acknowledged that "Missouri

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transaction involved when discussing those factors supporting application of the theory to Stephenson's.

34. *Id.* at 758.

courts no longer limit application of the theory to sellers alone."[35] The court did not discuss how far into the chain of distribution of a product the theory of strict products liability should extend. The better view would be to limit the class of defendants liable under the strict products liability doctrine to those who commercially lease defective unreasonably dangerous products to the public.[36] This type of transaction is more akin to the distribution and sale of a product contemplated by the Restatement and the *Katz* court. Those commercial lessors place the product in the stream of commerce to be leased by the ultimate consumer: their transaction is no different than a sale of the product.

The Act extends the class of defendants subject to liability under the theory of strict products liability to include commercial lessors. It states that a defendant is strictly liable for damages caused by use of a defective unreasonably dangerous product if he "transferred" the product in the course of his business and if the other elements required by the Act are met.[37] By using the term "transferred" rather than "sold", the Act varies from prior case law. Accordingly, the court should interpret the provision as legislative endorsement for extension of the theory of strict products liability to include a "commercial lessor" of a product.

One procedural change the Act makes to existing law is the "innocent seller" provision.[38] This provision ostensibly allows a "seller" in the stream of

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35. Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 244 (Mo. 1984) (en banc) (citing *Gabbard*). The court did not state that it would extend the theory as far as the *Gabbard* court, but merely observed that Missouri courts have expanded the class of defendants liable under the theory of strict products liability beyond the manufacturer and retailer. There are limitations as to how far a court will extend the doctrine of strict products liability. In Wright v. Newman, 735 F.2d 1073 (8th Cir. 1984) (construing Missouri law), the court refused to extend the class of persons liable under the doctrine of strict products liability to include a finance company financing a defective product. The court explained that the defendant Ford Motor Credit Company was not a distributor of the product in any sense and that its sole function was to finance products. *Id.* at 1078. The court found that finance companies were not in the "chain of distribution" that provides a product to the consumer. *Id.*

36. *See, e.g.*, Wallace v. Waco Scaffold & Equip. Co., 406 S.W.2d 480 (Mo. Ct. App. 1980) (applying strict products liability to a commercial lessor of scaffolding equipment). *But see* Vanskike v. ACF Indus., Inc., 665 F.2d 188, 197-98 (8th Cir. 1981) (construing Missouri law) (relying on *Gabbard* and holding that transfer of railway car from one railroad to another as part of the railroad interchange system was "commercial lease" subjecting railroad to strict products liability for injury caused by defect in railway car).

37. *See supra* note 18.

38. The Act provides:

> 1. A defendant whose liability is based solely on his status as a seller in the stream of commerce may be dismissed for a products liability claim as provided in this section.
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> 2. This section shall apply to any product liability claim in which another defendant, including the manufacturer, is properly before the court and from whom total recovery may be had for plaintiff's claim.
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> 3. A defendant may move for dismissal under this section within the time for filing an answer or other responsive pleading unless permitted by the court

commerce to be dismissed from a products liability suit if his liability is based solely on his status as a seller.[39] But, if the evidence supports any other theory of liability, the Act does not allow such dismissal.[40] Moreover, the seller may be dismissed only if another defendant who is not an innocent seller and from whom the plaintiff may obtain complete discovery is properly before the court.[41]

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at a later time for good cause shown. The motion shall be accompanied by an affidavit which shall be made under oath and shall state that the defendant is aware of no facts or circumstances upon which a verdict might be reached against him, other than his status as a seller in the stream of commerce.

4. The parties shall have sixty days in which to conduct discovery on the issues raised in the motion and affidavit. The court for good cause shown, may extend the time for discovery, and may enter a protective order pursuant to the rules of civil procedure regarding the scope of discovery on other issues.

5. Any party may move for a hearing on a motion to dismiss under this section. If the requirements of subsections 2 and 3 of this section are met, and no party comes forward at such a hearing with evidence of facts which would render the defendant seeking dismissal under this section liable on some basis other than his status as a seller in the stream of commerce, the court shall dismiss without prejudice the claim as to that defendant.

6. No order of dismissal under this section shall operate to divest a court of venue or jurisdiction otherwise proper at the time the action was commenced. A defendant dismissed pursuant to this section shall be considered to remain a party to such action only for such purposes.

7. An order of dismissal under this section shall be interlocutory until final disposition of plaintiff's claim by settlement or judgment and may be set aside for good cause shown at anytime prior to such disposition.

MO. REV. STAT. § 537.762 (Supp. 1987).

39. *Id.*

40. *Id.*

41. *Id.* Under the Act, an innocent seller may be dismissed only if the plaintiff can obtain complete recovery for the damages from another party which is not an "innocent seller". Thus, in those cases where the only defendants are those that claim they are innocent sellers, and there is no evidence showing that one of those defendants would be liable under some other theory, none of the defendants could be dismissed under this section.

The Act does not explain whether the damages for which total recovery must be had are limited to compensatory damages or whether they include punitive damages. In some cases, a defendant which is not an innocent seller may be solvent for purposes of paying compensatory damages but would be insolvent for purposes of paying punitive damages (*e.g.*, some defendants will have liability insurance to pay compensatory damages but will not have insurance to cover any punitive damages award). Unlike the compensatory damages award, defendants are not jointly and severally liable for punitive damages. The jury assesses punitive damages against each tortfeasor based on that tortfeasor's misconduct. Therefore, the better rule would be to limit the "damages" for which a solvent party must be before the court to the compensatory damages.

Another unanswered question is what must be shown to demonstrate that the remaining defendants are those from whom total recovery may be had. In those cases in which the remaining defendants have liability insurance which would pay any compensatory damages award, the courts should interpret the phrase, "from whom total recovery may be had for plaintiff's claim", to include the liability insurance. The court should not look solely at the defendant's financial condition. In those cases in which the

This provision does not change the substantive law relating to an innocent seller's liability; its effect is only procedural.[42] Under the comparative indemnity principles enunciated in *Missouri Pacific Railroad Co. v. Whitehead & Kales Co.*,[43] the innocent seller could always file a third party petition (or cross-claim) to obtain complete indemnity from the more responsible defendants such as the manufacturer of the defective product. *Whitehead & Kales* allows the innocent seller to adjudicate its responsibility for the plaintiff's injury.[44] The seller would assert that it was simply a seller in the stream of commerce and entitled to complete indemnity from the manufacturer.[45] The purported purpose of the "innocent seller" provision is to allow a seller to be released at an early stage of the litigation, rather than wait until the completion of litigation to obtain indemnity.[46]

However, this provision will create more uncertainty for the "innocent seller" regarding its ultimate liability. Under the provision a defendant may obtain dismissal only if there are no facts or circumstances subjecting him to liability other than in his status as an innocent seller. After the defendant files his motion and affidavit for dismissal, discovery is conducted for a minimum of sixty days on the issues raised by the motion and affidavit.[47] The parties will be permitted to discover, for example, all parties' financial condition and liability insurance coverage;[48] facts relating to the plaintiff's medical condition, lost wages, medical expenses, pain and suffering, and other special damages;[49]

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remaining defendants do not have insurance, the court should look to the defendant's net worth to determine whether total recovery may be had from that defendant. Although this measure may not demonstrate liquid assets, it provides a rough measure of the defendant's financial condition.

42. Because the innocent seller provision is procedural only, it will not apply to actions filed in federal court.

43. 566 S.W.2d 466 (Mo. 1978) (en banc).

44. *See infra* notes 183-206 for a thorough discussion of *Whitehead & Kales.*

45. *See, e.g.*, Welkener v. Kirkwood Drug Store Co., 734 S.W.2d 233, 240-45 (Mo. Ct. App. 1987) (seller in stream of commerce with no other basis for liability other than in its status as seller entitled to complete indemnity from manufacturer); *see also* Hales v. Green Colonial, Inc., 402 F. Supp. 738, 741 (W.D. Mo. 1975) (seller has claim for indemnity "against the manufacturer of a defective product . . . where the seller seeking indemnity has no actual knowledge of the defect").

46. Final Report of the Missouri Task Force on Liability Insurance at 26-27 (January 6, 1987) (hereinafter "Final Report").

47. As a practical matter, the discovery will almost never be completed within 60 days. The issues raised by the motion are numerous and complex. *See infra* notes 48-51 and accompanying text.

48. This information will be discoverable because the court must determine whether there are non-innocent seller defendants from whom complete recovery may be had for plaintiff's claim. *See supra* notes 38-41 and accompanying text.

49. This evidence obviously must be discovered before the court can determine whether complete recovery may be had from the remaining defendants. The court cannot rely on the prayer for relief, because the Act eliminated the prayer for relief from the petition. MO. REV. STAT. § 509.050.1(2) (Supp. 1987). A plaintiff's attorney should hesitate before providing a "ball park" figure of the compensatory damages his client will seek and permitting the dismissal of a defendant under this section. Often a plain-

facts regarding any alteration the moving defendant made or should have made to the product; and facts demonstrating any notice of danger to the moving defendant.[50] After completion of this stage of discovery, any party may move for a hearing on the motion.[51]

If any party presents evidence which would make the movant liable under any theory other than in his status as seller, the motion for dismissal must be denied.[52] Because the Act does not establish a standard of proof permitting dismissal, a court should follow the summary judgment standard. The movant will be dismissed only if "there is no genuine issue as to any material fact" regarding his liability under any other theory of recovery.[53] The party opposing dismissal may not rest upon mere allegations but must present specific facts showing the moving party could be liable on some other theory of recovery.[54] Unlike the motion for summary judgment, once the movant files his motion and affidavit, the nonmovants have the burden of presenting evidence making the movant liable on some other theory. The movant would still have the burden of demonstrating that plaintiff could obtain complete recovery from the other defendants. If there is a genuine issue of material fact on any of the issues, the movant's motion must be denied.

Even if the motion is granted, the order of dismissal is without prejudice and is interlocutory until final disposition by settlement or judgment.[55] It may be set aside at any time for good cause shown.[56] In other words, if any party presents evidence which would make the dismissed defendant liable on any other theory, the dismissed defendant would again be made a party to the litigation. Even when final disposition occurs and the order of dismissal becomes final, the Act only allows a dismissal without prejudice.[57]

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tiff's damages will increase from the time the suit is filed to the time of trial because of unforeseen medical complications or unknown permanency of disability.

50. These facts could create a duty to warn, test or remedy under which the moving party could be liable.

51. MO. REV. STAT. § 537.762 (Supp. 1987). As a practical matter, about the only remaining discovery would be on the claim that the product is unreasonably dangerous and on any punitive damages claims against the remaining defendants.

52. *Id.*

53. *See* MO. R. CIV. P. 74.04(c).

54. MO. REV. STAT. § 537.762 (Supp. 1987); *see* MO. R. CIV. P. 74.04(e).

55. MO. REV. STAT. § 537.762 (Supp. 1987). Because the order is interlocutory, an interesting issue arises as to whether federal courts would obtain diversity jurisdiction in those cases in which a defendant defeating diversity was dismissed.

56. *Id.*

57. This anomalous result is required by the Act. The order of dismissal without prejudice is interlocutory. Upon disposition, it becomes a final order of dismissal without prejudice. A party will rarely move for dismissal under MO. REV. STAT. § 537.762 (Supp. 1987) because the expense of discovery would be enormous for obtaining a dismissal without prejudice. The innocent seller should always seek dismissal based upon MO. R. CIV. P. 74.04, because the order of dismissal in that section would be with prejudice to the right to any party to bring another action. The legislature probably intended that the order of dismissal without prejudice under the innocent seller provision becomes an order of dismissal *with prejudice* upon disposition of the underlying

At any time within the statutory limitations period, a plaintiff may file another action against the dismissed defendant if facts arise showing the dismissed defendant would be liable on another theory. Similarly, the other defendants may seek contribution from the dismissed defendant if facts arise showing that he would be liable for contributions on any theory other than in his status as seller.[58] If the "innocent seller" had remained a defendant in the original action rather than obtaining dismissal under this provision, his possibility of liability would have ended. He would have had a final adjudication of his responsibility for the plaintiff's injury and of his relative contribution, if any, for the plaintiff's injury.

The provision also fails to acknowledge the undefined class of transferors; it only allows dismissal of innocent "sellers". As previously discussed, the legislature incorporated the term "transferred" in the Act to endorse inclusion of the commercial lessor in the class of defendants liable under strict products liability.[59] The reason for including the commercial lessor is because the commercial lease transaction is no different than the sale of the product.[60] There is no rational basis for not including the innocent transferor in the class of those that may obtain dismissal under this section of the Act. The innocent transferor—by legislative amendment or judicial interpretation—should be considered an innocent seller for purposes of obtaining dismissal under this provision.

As a practical matter, discovery under the "innocent seller" provision would involve all those matters that would be required for obtaining a summary judgment on its liability. In addition, discovery costs will be greater than discovery costs of seeking a summary judgment on liability, because the defendant moving for dismissal under the innocent seller provision would need to demonstrate the extent of the plaintiff's damages and the financial status of the remaining defendants. Under a motion for summary judgment on the issue of liability, a defendant would not need to discover that information. Accordingly, a defendant should carefully consider whether the "innocent seller" provision offers him any advantages before seeking dismissal. In most cases, the defendant probably would be better served to seek discovery on the issues which would allow him to move for a summary judgment under Supreme Court Rule 74.04 on the issues of liability and contribution.

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action. Because the Act is not clear on this issue, the legislature should amend MO. REV. STAT. § 537.762 (Supp. 1987) to state that the dismissal becomes a dismissal with prejudice upon the disposition of the underlying case by adjudication or settlement.

58. *See* Safeway Stores, Inc. v. City of Raytown, 633 S.W.2d 727 (Mo. 1982) (en banc). If the Act permitted the dismissal to be with prejudice, the other defendants could not seek contribution; an adjudication would have occurred that the defendants are not joint tortfeasors.

59. *See supra* notes 24-37 and accompanying text.

60. *Id.*

B. *Defective and Unreasonably Dangerous Condition at the Time of Sale*

The second element of a strict products liability action requires the plaintiff to prove that the product at the time of sale "was *then* in a defective condition unreasonably dangerous when put to a reasonably anticipated use."[61] This requirement applies in cases alleging a manufacturing defect, design defect or defect for failing to warn.[62] Stated otherwise, plaintiff must show that the defective unreasonably dangerous condition "existed when the [product] left the manufacturer's [or seller's] control and entered the stream of commerce. . . ."[63] This requirement originated from the comments to the Restatement (Second) of Torts Section 402A (1965).[64]

Although the requirement might seem insurmountable, Missouri courts allow a plaintiff to prove the existence of a defective condition unreasonably dangerous at the time of sale through circumstantial evidence. For example, the product need not be new to establish that the defective condition existed at the time of sale. Evidence showing the product has not undergone alterations, repairs or modifications since the sale has been sufficient in some cases to prove circumstantially that the defective unreasonably dangerous condition existed at the time of sale.[65] An expert's testimony can provide the proof re-

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61. M.A.I. 25.04 (1981).

62. See *supra* note 21.

63. Brissette v. Milner Chevrolet Co., 479 S.W.2d 176, 181 (Mo. Ct. App. 1972); *see also* Fahy v. Dresser Indust., Inc., 740 S.W.2d at 639-40; Lewis v. Envirotech Corp., 674 S.W.2d 105, 110 (Mo. Ct. App. 1984); Patterson v. Foster Forbes Glass Co., 674 S.W.2d 599, 603 (Mo. Ct. App. 1984); Coulter v. Michelin Tire Corp., 622 S.W.2d 421, 425 (Mo. Ct. App. 1981), *cert. denied*, 456 U.S. 906 (1982).

A related issue is whether a plaintiff may sue a distributor or seller of a used product based on strict products liability. The plaintiff would claim that the seller should be liable for selling a defective product and whether the product is new or used should be irrelevant. Missouri courts have not addressed the issue. *See, e.g.*, Williams v. Nuckolls, 644 S.W.2d 670, 674 n.5 (Mo. Ct. App. 1982). *But cf.* Yokum v. Piper Aircraft Corp., 738 S.W.2d 145, 147 (Mo. Ct. App. 1987) (one selling used product, but not a distributor of used products on ongoing basis, not liable in products liability).

64. *See supra* note 22. Comment g to the Restatement emphasizes that "[t]he burden of proof that the product was in a defective condition at the time it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained." RESTATEMENT (SECOND) OF TORTS § 402A comment g (1965).

65. Helm v. Pepsi-Cola Bottling Co., 723 S.W.2d 465, 468-69 (Mo. Ct. App. 1986); Klein v. General Elec. Co., 714 S.W.2d 896, 899-900 (Mo. Ct. App. 1986); Wadlow v. Linder Homes, Inc., 722 S.W.2d 621, 625 (Mo. Ct. App. 1986); Coulter v. Michelin Tire Corp., 622 S.W.2d 421, 427 (Mo. Ct. App. 1981), *cert. denied*, 456 U.S. 906 (1982); Tennis v. General Motors Corp., 625 S.W.2d 218, 222-23 (Mo. Ct. App. 1981); Williams v. Deere & Co., 598 S.W.2d 609, 612-13 (Mo. Ct. App. 1980).

For example, in *Williams v. Deere & Co.*, plaintiff alleged a tractor had a defective gear shift. The court noted that the fact that the tractor was two years old did not preclude recovery. The court commented that in the circumstances of the case, the gear shift should have lasted more than two years absent proof of alteration or unreasonable interference. The tractor's owner and the defendant's service manager had testified

quired for a finding that the product was unreasonably dangerous at the time of sale,[66] although such expert testimony is required only in those cases involv-

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that, to their knowledge, the tractor had not undergone any substantial alteration since its manufacture and sale. *Williams*, 598 S.W.2d at 612-13.

Other facts may adversely affect the plaintiff's ability to meet his burden of proof. Proof may be complicated by the presence of an intermediary seller or sellers (distributor and/or dealer). Williams v. Ford Motor Co., 494 S.W.2d 678, 680 (Mo. Ct. App. 1973) ("When on the evidence it appears equally probable that the defect has developed in the hands of the dealer, the plaintiff has not made out a case of strict liability, or even negligence, against any prior party."). The passage of time, the product's age, and the product's use without incident increases the plaintiff's difficulty of establishing a defect at the time of manufacture or sale. In Williams v. Nuckolls, 644 S.W.2d 670 (Mo. Ct. App. 1982), for example, plaintiff sued the seller of a 10-year old car with 92,000 miles at the time of sale. Plaintiff alleged that the product was defective because the brakes had failed after he had driven it a total of four miles. The court concluded plaintiff had presented insufficient evidence that a defect cognizable under strict products liability existed at the time of sale. The court ruled that the inference of sudden failure from age was as compelling as plaintiff's claim of a pre-existing defect:

> Here, the evidence does not tend to exclude reasonable conclusions other than the existence of a defect at the time of the sale. Under the circumstances of this case, which include the age and mileage of the automobile plus the suddenness of the brake failure, resort to speculation and conjecture would be required to determine both the existence and the discoverability at the time of sale of whatever defective condition may have caused the brake failure.
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> "Evidence which points equally to a cause for which the defendants are responsible and to one for which the defendants are not responsible is not sufficient to make a case for submission to a jury."

Id. at 673 (quoting Hale v. Advance Abrasive Co., 520 S.W.2d 656, 659 (Mo. Ct. App. 1975)). *See also* Glass v. Allis-Chalmers Corp., 618 F. Supp. 314 (E.D. Mo. 1985), *aff'd*, 789 F.2d 612 (8th Cir. 1986) (construing Missouri law) (to hold manufacturer liable for unavoidable accident or ordinary wear and tear would be to place manufacturer or seller in place of an insurer, which is not allowed under Missouri law); Shepard v. Ford Motor Co., 457 S.W.2d 255 (Mo. Ct. App. 1970) (plaintiff failed to establish a defect at the time the truck was manufactured by Ford despite allegations that the accident was caused by defective U-Bolts). While these cases state that plaintiff may rely upon circumstantial evidence to prove defect, they also demonstrate that factors such as the passage of time, normal wear and tear, and plaintiff's failure to maintain the product will preclude a plaintiff from establishing a defect existing at the time of the product's manufacture and sale. *But cf.* Commercial Distrib. Center, Inc. v. St. Regis Paper Co., 689 S.W.2d 664, 669 (Mo. Ct. App. 1985) (reversing lower court's directed verdict for defendant and holding that expert's testimony that the product as designed created a "potential for accelerated corrosion", which was the casual defect, was sufficient to submit issue of defect to jury).

66. *See, e.g.*, Commercial Distrib. Centers, Inc. v. St. Regis Paper Co., 689 S.W.2d 664, 670 (Mo. Ct. App. 1985); Coulter v. Michelin Tire Corp., 622 S.W.2d 421, 427 (Mo. Ct. App. 1981), *cert. denied*, 456 U.S. 906 (1982); Brissette v. Milner Chevrolet Co., 479 S.W.2d 176, 181-82 (Mo. Ct. App. 1972); *see also* Siebern v. Missouri-Illinois Tractor & Equip., 711 S.W.2d 935, 939 (Mo. Ct. App. 1986) (expert testimony on defectiveness necessary because the requirement of design, the definition of danger and what might be anticipated in the operation of very large, very powerful equipment are outside experience of the average juror).

ing complex design issues.[67] Conversely, proof that the product has been altered since the time of sale and that the alteration is unforeseeable precludes an action against the manufacturer or seller.[68] Even when the product alteration was foreseeable, a manufacturer is not liable if the alteration made an otherwise safe product unsafe.[69] An alteration to the product which does not create the unreasonably dangerous condition causing the plaintiff's injury, however, does not relieve the manufacturer or seller of liability for injury caused by a defective unreasonably dangerous product.[70]

The Act should not change this analysis. It incorporates verbatim the language of M.A.I. 25.04.[71] Missouri courts should continue to require proof by direct or circumstantial evidence that the defective unreasonably dangerous condition of the product existed at the time the product left the control of the manufacturer, seller or distributor.

C. *Defective Condition Unreasonably Dangerous*

Plaintiff must prove in a case alleging defective design that the product at the time of sale was "in a defective condition unreasonably dangerous when put to a reasonably anticipated use." In a case alleging failure to warn, plaintiff must prove that at the time of sale the product was "unreasonably dangerous when put to a reasonably anticipated use without knowledge of its characteristics." Thus, a failure to warn claim requires the additional proof that the product is unreasonably dangerous when put to a reasonably anticipated use "without knowledge of its characteristics." This difference is important be-

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67. *See, e.g.*, Klein v. General Elec. Co., 714 S.W.2d 896, 900 (Mo. Ct. App. 1986); Wadlow v. Lindner Homes, Inc., 722 S.W.2d 621, 625 (Mo. Ct. App. 1986); Moslander v. Dayton Tire & Rubber Co., 628 S.W.2d 899, 904 (Mo. Ct. App. 1982); Tennis v. General Motors Corp., 625 S.W.2d 218, 222 (Mo. Ct. App. 1981); Williams v. Deere & Co., 598 S.W.2d 609, 612 (Mo. Ct. App. 1980); Weatherford v. H.K. Porter, Inc., 560 S.W.2d 31, 34 (Mo. Ct. App. 1977); Winters v. Sears, Roebuck & Co., 554 S.W.2d 565, 569-70 (Mo. Ct. App. 1977). For example, in Patterson v. Foster Forbes Glass Co., 674 S.W.2d 579 (Mo. Ct. App. 1970), a baby bottle exploded. The court held that the force of the explosion made it reasonable to infer that the explosion was caused by a defect in physical composition of the bottle rather than something else.

68. *Compare, e.g.*, Glass v. Allis-Chalmers Corp., 789 F.2d 612 (8th Cir. 1986) (construing Missouri law) (safety features of combine had been removed since the time of sale and combine's engine had been completely rebuilt) *with* Duke v. Gulf & Western Mfg. Co., 660 S.W.2d 404, 414 (Mo. Ct. App. 1983) (alteration in punch press was foreseeable in light of evidence showing that 5% of all punch presses had been altered and that the defendant was aware of the alterations) *and* Vanskike v. ACF Indus., Inc., 665 F.2d 188, 195 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), (construing Missouri law) ("subsequent changes or alterations in the product do not relieve the manufacturer of strict liability if the changes were foreseeable and the changes do not unforeseeably render the product unsafe").

69. Gomez v. Clark Equip. Co., 743 S.W.2d 424 (Mo. Ct. App. 1988).

70. *See, e.g.*, Fahy v. Dresser Indust., Inc., 740 S.W.2d at 639-70; Jarrell v. Fort Worth Steel & Mfg. Co., 666 S.W.2d 828, 835 (Mo. Ct. App. 1984).

71. *Compare supra* note 18 *with supra* note 22.

cause it makes recovery based on a design defect and for failure to warn inconsistent. This Section will discuss how courts should determine that a product is "unreasonably dangerous when put to a reasonably anticipated use" and will explore the inconsistencies between the action based on defective design and the one based on failure to warn adequately.

1. Defective Design

What constitutes a defective design unreasonably dangerous to the user has perplexed Missouri courts since the adoption of strict products liability. The Missouri Supreme Court in *Lietz v. Snyder Manufacturing Co.*[72] stated that there is a distinction between the defective condition of the product and the dangerous character of the product when put to a reasonably anticipated use. After the court made this statement, one commentator opined that a plaintiff must prove both that the product is defective *and* that it is unreasonably dangerous when put to a reasonably anticipated use.[73]

Use of the term "defective condition" and requiring proof in addition to proof that the product is unreasonably dangerous has confused Missouri juries in design defect cases.[74] This confusion may result from the dual meaning that can be associated with the term "defective condition." "Defective condition" has a common meaning outside the law of strict products liability which may not coincide with the meaning used in strict products liability cases. For example, a jury might have difficulty understanding how a product can be "defective" when it has been manufactured and designed exactly as the manufacturer intended.

Some Missouri courts of appeal recognized that "defective condition" has little independent meaning in a strict products liability case where the product is manufactured precisely as it was designed to be manufactured.[75] Rather than requiring proof in a design defect case that the product is both defective *and* unreasonably dangerous, the better approach would be to create a unitary standard. In a design defect case, therefore, a product would be defectively designed *if* it is in a condition unreasonably dangerous to the user when put to a reasonably anticipated use. Only proof on the unreasonable dangerousness of the product would be required. Both requirements—proof of defect *and* proof that the product is unreasonably dangerous as manufactured—should be included in a manufacturing defects case. The flaw in the product in a manufac-

72. 475 S.W.2d 105, 109 (Mo. 1970).

73. 1 MISSOURI TORT LAW, Products Liability § 8.7, at 8-7 (1978).

74. *See, e.g.*, Wallace v. Waco Scafford & Equip. Co., 606 S.W.2d 480, 482 (Mo. Ct. App. 1980) (the jury asked if it should consider "safety of design" in determining "defective condition" and the judge refused to clarify the instruction); Rinker v. Ford Motor Co., 567 S.W.2d 655, 659 (Mo. Ct. App. 1978) (the jury requested a definition of the word "defective" and the trial judge refused to clarify the term).

75. *E.g.*, Braun v. General Motors Corp., 579 S.W.2d 766, 769 n.3 (Mo. Ct. App. 1979).

turing defect case is that the product was not manufactured according to design specifications. This is conceptually different from a design defect flaw, in which the product is manufactured in accordance with its intended design but is nonetheless defective.

In *Nesselrode*, the Missouri Supreme Court adopted the unitary standard for design defect cases and removed some of the confusion created by the *Lietz* decision. The court explained:

> To establish liability in a design defect case, the plaintiff bears the burden of demonstrating that the product, as designed, is unreasonably dangerous *and therefore* "defective," and that the demonstrated defect caused his injuries. Though obviously abbreviated, the foregoing explanation describes the heart and soul of a strict tort liability design defect case—unreasonable danger and causation.[76]

To ensure that lower courts do not require proof on both defect and unreasonable dangerousness, the court emphasized that "[u]nder Missouri's law of strict tort liability, a product's design is deemed defective, for purposes of imposing liability, when it is shown by a preponderance of evidence that the design renders the product unreasonably dangerous."[77] Thus, after *Nesselrode*, a plaintiff in a design defect case must prove that the product was "unreasonably dangerous" when put to a reasonably anticipated use. Separate proof on defectiveness is not required.[78]

Whether a product is unreasonably dangerous when put to a reasonably anticipated use has generated a great amount of discussion by Missouri courts. Because defect in a design defect case only requires proof that the product was unreasonably dangerous, this term will be discussed with even more frequency by the courts. Missouri courts of appeal before *Nesselrode* sometimes mentioned the Restatement's "consumer expectation" standard when discussing whether a product was unreasonably dangerous.[79] The consumer expectation standard requires a finding that the product was unreasonably dangerous if it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it.[80] In *Aronson's Men's Store, Inc. v. Potter Electric Signal, Inc.*,[81] the Missouri Supreme Court also discussed the Restatement's consumer expectations test but did not endorse it. More recently in *Nesselrode*, the supreme court stressed that it had not held that "the standard

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76. 707 S.W.2d 371, 375-76 (Mo. 1986) (en banc) (emphasis added).

77. *Id.* at 377 (footnotes omitted).

78. For a discussion of the necessity of defining the term, "unreasonably dangerous," in light of its increased importance in a design defect case, *see infra* notes 79-93. Courts should continue to require separate proof of defectiveness and of the unreasonably dangerous condition or character of the product in a manufacturing defect case.

79. Racer v. Utterman, 629 S.W.2d 387 (Mo. Ct. App. 1981), *cert. denied sub nom.*, Racer v. Johnson & Johnson, 459 U.S. 803 (1982); Brawner v. Liberty Indus., 573 S.W.2d 376 (Mo. Ct. App. 1978); Crysts v. Ford Motor Co., 571 S.W.2d 683 (Mo. Ct. App. 1978).

80. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).

81. 632 S.W.2d 472, 474 (Mo. 1982) (en banc).

of defectiveness was rooted *only* in the expectations of the ordinary consumer."[82]

Although stressing that the consumer expectation standard is not the only standard of defectiveness, the *Nesselrode* court did not endorse an applicable standard. Neither party had raised the issue on appeal, and the court chose not to decide the question.[83] Nevertheless, the court's discussion of the *Nesselrode* case and of plaintiff's proof that the product was unreasonably dangerous when put to a reasonably anticipated use indicates that the court would adopt the risk-utility test.

The risk-utility test involves a balance of the risk or danger in using the product with the utility or usefulness of the product.[84] This test departs from the "consumer expectation" model in that it allows the jury to look at a wide range of factors in determining whether the product is "unreasonably dangerous" as designed. The factors include the need served by the product or its usefulness; the availability (technological and economic feasibility) of a substitute product meeting the same needs which is not as unsafe; the ability to eliminate unsafe aspects of the design without impairing its usefulness; the user's anticipated awareness (consumer expectation) of the danger inherent in use of the product; the likelihood that the product will cause injury compared with the probable seriousness of the injury[85] and the obviousness of the danger

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82. 707 S.W.2d at 377-78 n.10 (emphasis added).

83. *Id.* at 378.

84. Deans Keeton and Wade advocate the risk-utility test. Each has developed a list of factors he believes the jury should balance as part of its decision-making process. *See, e.g.*, Keeton, *The Meaning of Defect in Products Liability Law—A Review of Basic Principles*, 45 MO. L. REV. 579, 589-91 (1980); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973).

85. Plaintiffs often offer evidence of other accidents in an attempt to prove the product is unreasonably dangerous. Because this type of evidence is extremely prejudicial, injects issues involving other cases not before the court and seldom can provide an inference of defect, the court must exercise strict control over admission of other accidents evidence. Notice of danger is not an issue under Missouri strict products liability law whether the action is based on defective design or failure to warn. *E.g.*, Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371, 382-83 (Mo. 1986) (en banc). Thus, evidence of other accidents would be admissible only on the issue of foreseeable use and whether the product was unreasonably dangerous.

Before any evidence of an other accident is admissible, a plaintiff must prove that the proffered other accident is substantially similar to his accident. *E.g.*, Lewy v. Remington Arms Co., 836 F.2d 1104, 1108 (8th Cir. 1988) (construing Missouri law); Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322, 1332 (8th Cir. 1985) (construing Missouri law); Keller v. International Harvester Corp., 648 S.W.2d 584, 589 (Mo. Ct. App. 1983); *cf.* Klein v. General Elec. Co., 714 S.W.2d 896, 904-05 (Mo. Ct. App. 1986) (holding that trial court's refusal to admit experimental evidence proper and stating that such tests are admissible only when conducted under conditions substantially similar to conditions existing at time of occurrence giving rise to suit; when admitted to show a product's tendency to produce an effect of a given character, "there must be substantial similarity in circumstances as might affect the result in question"). Before the evidence is admissible, the proponent must provide foundational facts which show with reasonable certainty that other possible causes of the other accident were not

to the user (such as with a knife).[86] The majority in *Nesselrode* expressed concern that use of an external standard to define the term "unreasonably

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involved. *Cf.* Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 246 (Mo. 1984) (en banc) (if injury may have resulted from one of two causes, plaintiff must show with reasonable certainty that cause for which defendant is liable produced the result). Absent that proof, no evidence of other accidents is admissible.

In *Keller*, the court of appeals held the trial court properly excluded evidence of other accidents involving International Harvester products because plaintiff had failed to establish that the other accidents were substantially similar to his accident. *Keller*, 648 S.W.2d at 589. The proffer was insufficient because there was no evidence that the other accidents involved the same model and product design, the same causal design defect and the same conditions and terrain of use. *Id. See also Lewy v. Remington Arms Co.*, 836 F.2d at 1108 (holding trial court properly admitted evidence of other accidents involving the same model and product design, same circumstances and same alleged causal defect; also holding trial court improperly admitted evidence of other accidents involving differently designed product and different causal defect). Similarly, in *Hale*, the Eighth Circuit reversed the trial court for admitting evidence of other accidents because there was an "insufficient showing of similarity." *Hale*, 756 F.2d at 1332.

Plaintiffs also often seek to introduce statistical evidence relating to accident rates of products. This evidence is highly suspect, because it oversimplifies the circumstances surrounding the accidents contained within the data. Statistical evidence of this type should be reviewed carefully by the trial court, comparing prejudice against relevancy and quality of proof. The proponent must establish relevancy and an adequate foundation by showing that the statistics involve comparable circumstances. Siebern v. Missouri-Illinois Tractor & Equip., 711 S.W.2d 935, 941 (Mo. Ct. App. 1986) (citing Sturm v. Clark Equip. Co., 547 F. Supp. 144 (W.D. Mo. 1982), *aff'd*, 732 F.2d 161 (8th Cir. 1984)).

The court must, therefore, carefully analyze the facts and circumstances of plaintiff's accident, determine the alleged causal defect, ascertain what model and product is involved, and eliminate those accidents occurring after the plaintiff's accident. Once the court has made this determination, plaintiff must produce evidence showing that the proffered other accidents meet these criteria of substantial similarity before the other accidents are admissible. Next, the court must rule out other possible causes of the accident. This would require the plaintiff to show for each other proffered accident that the cause for which the defendant is responsible was more likely than not the cause of the other accident. *See Zafft*, 676 S.W.2d at 246. Absent that proof, the other accident could have been caused by plaintiff's unforeseeable misuse or abuse of the product, for example. It would not provide any inference that a defect in the product was responsible for causing the other accident. These are minimal requirements and are not intended to be a comprehensive statement of all factors a court should require before allowing evidence of other accidents to be introduced to the jury.

Because of the time consuming process required to establish this foundation, a court should hold evidentiary hearings before trial outside the presence of the jury. *See, e.g.*, Rexroad v. American Laundry Press Co., 674 F.2d 826 (10th Cir. 1983), *cert. denied*, 459 U.S. 862 (1982). Once the minimal foundation is established, the court must determine what evidence may be introduced. That evidence should be limited to a statement of the claimant involved, the causal defect, the model and design of product, and the similar circumstances and conditions of use. The defendant must be given the opportunity to rebut this evidence by demonstrating that other potential causes produced the other accident, not the defendant's product.

86. *See id.*

dangerous" by the giving of abstract, abstruse standards, impossible to comply with, only perpetuates the mystical trial by ordeal and *may conceal a hook in a transcendental lure that will snag an appellate court.*"[87] Nevertheless, in discussing whether the plaintiff had established that the defendant's product was unreasonably dangerous, the court used the risk-utility test in its analysis.

Nesselrode involved a wrongful death action in which an airplane crashed shortly after takeoff. The pilot and the three passengers were killed. Plaintiff contended that two important flight components controlling the upward and downward movement of the airplane, the left and right actuators, were defective and unreasonably dangerous as designed. The design of the actuators allowed them to be installed incorrectly, the right actuator in the left position and the left actuator in the right position. In *Nesselrode*, the actuators were installed in the wrong positions. Reversing the placement of the actuators causes the airplane to react in the opposite direction of the way it was intended to act: when attempting to climb, the nose of the plane was instead forced downward. The jury in *Nesselrode* returned a verdict of $1,500,000, and defendant appealed arguing that plaintiff had failed to demonstrate that the product was unreasonably dangerous as designed.

In discussing the evidence supporting plaintiff's position, the *Nesselrode* court noted that alternative designs were feasible and available. The industry design standard existing at the time the actuators were designed required one to "design critical flight parts in a way which makes it physically impossible to install them or assemble them in any way but the right way."[88] The court pointed out that FAA licensed airframe and power plant mechanics testified that it was not obvious by physical inspection to determine the right actuator from the left actuator.[89] The danger in switching the actuators during installation was not obvious. Furthermore, the court noted that the mechanics, the consumer or user of the product, expected that the defendant had designed the product according to the industry design standard precluding incorrect installation. The plaintiff also introduced evidence that the product could have been designed with safety features precluding incorrect installation without affecting the actuators' performance.[90]

By focusing its discussion on the availability and feasibility of an alternative design, on the unobviousness of incorrect installation, on the capability to redesign the actuators so as to prevent incorrect installation without impairing the product's usefulness, and on the user's expectation that the product had been designed to preclude incorrect installation, the *Nesselrode* court discussed the proof from a risk-utility standard. Accordingly, if the issue were to be raised, the court would probably adopt a risk-utility test.[91]

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87. 707 S.W.2d at 378 (court's emphasis) (quoting Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 Tex. L. Rev. 1185, 1188 (1976)).
88. *Id.* at 379.
89. *Id.*
90. *Id.* at 380.
91. Adoption of the risk-utility test would be consistent with the approach devel-

To find that a product is unreasonably dangerous, the jury must have some standard against which to compare the product. The concept of unreasonableness assumes that there is a standard of reasonableness against which one can determine whether the product is unreasonably dangerous as designed. Without a standard or instruction to guide the jury, confusion will reign. Lower courts should begin to define by instruction the term, "unreasonably dangerous," for the jury.[92]

Because the supreme court expressed concern in *Nesselrode* about limiting the jury's consideration of factors to include in its determination of

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oping in the lower courts and in the federal courts' interpretation of Missouri law. The court in Duke v. Gulf & Western Mfg. Co., 660 S.W.2d 404, 410-13 (Mo. Ct. App. 1983) discussed at length the risk-utility approach and the benefit of using the standard in a complex case, although finding it unnecessary to adopt the approach in a technologically simple case. In Limbocher v. Ford Motor Co., 619 S.W.2d 757, 759 (Mo. Ct. App. 1981), the court upheld a verdict for defendant, noting that an expert for the plaintiff had testified that the tractor was dangerous and not reasonably safe because it was not equipped with a slope indicator. The defendant's expert had testified that such a device was not available on the market at the time of sale. In Hurt v. General Motors Co., 553 F.2d 1181, 1184 (8th Cir. 1977) (construing Missouri law), the court emphasized that while car manufacturers could design and build cars with the features of an army tank, "the average and reasonable automobile user desires only a reasonable, safe, economical form of motor transportation. No greater burden of design-performance ought to be imposed upon automobile manufacturers by either judge or jury." The manufacturer in *Hurt* was allowed to offer evidence that it had complied with federal government regulations and standards governing the installation of seat belts in motor vehicles at the time of manufacture.

In Hoppe v. Midwest Conveyor Co., 485 F.2d 1196, 1202 (8th Cir. 1973) (construing Missouri law), the court noted that "[t]he comparative design with similar and competitive machinery in the field, alternative designs and post-accident modification of the machine, the frequency or infrequency of use of the same product without mishap, and the relative cost and feasibility in adopting other designs are all relevant to proof of defective design." *See also* McGowne v. Challenge Cooke Bros., Inc., 672 F.2d 652, 663 (8th Cir. 1982) (construing Missouri law) (obviousness of defect or danger is material to issue of whether a product is unreasonably dangerous); Polk v. Ford Motor Co., 529 F.2d 259, 263-66 (8th Cir. 1976), *cert. denied*, 426 U.S. 907 (1976) (construing Missouri law) (availability of alternative designs in other vehicles at the time of manufacture was relevant); Braun v. General Motors Corp., 579 S.W.2d 766, 770 (Mo. Ct. App. 1979) (evidence admitted that manufacturer's design met and exceeded the Federal Motor Vehicle Safety Standards in effect at the time of manufacture).

92. In *dicta*, the court of appeals in Jarrell v. Fort Worth Steel & Mfg. Co., 666 S.W.2d 828, 837 (Mo. Ct. App. 1984), stated that to define the terms "defective" and "unreasonably dangerous" would be an impermissible deviation from M.A.I. 25.04 (1981). The court reasoned that where an approved instruction is applicable, "its use is mandatory and failure to use the mandatory instruction is presumed to be prejudicial error." *Id.* (citing Eckert v. Dishon, 617 S.W.2d 649, 650 (Mo. Ct. App. 1981) and McGowan v. Hoffman, 609 S.W.2d 160, 164 (Mo. Ct. App. 1980)). The court, however, mistakenly assumes that because M.A.I. 25.04 (1981) must be given in a strict products liability action that an additional instruction defining the term "unreasonably dangerous" cannot be given. In light of the supreme court's decision in *Nesselrode*, one must conclude that the *Jarrell* court is wrong and that an instruction should be given to provide guidance to the jury.

whether a product is unreasonably dangerous, lower courts should define the term, "unreasonably dangerous," in the following manner: in determining whether a product is unreasonably dangerous, you should consider whether the usefulness of the product is outweighed by the risk of the product when put to a reasonably anticipated use.[93] This instruction would provide a framework for the jury in deciding whether a product is "unreasonably dangerous." The usefulness of the product would be compared with its risk when put to a reasonably anticipated use. Using the following language, for example, the court would then instruct the jury that they may consider, "among other things, the following factors in [their] decision as to whether the product is unreasonably dangerous," and list those factors the litigants believe should be considered by the jury for a particular case. By not limiting factors to consider in the equation, the instruction would leave open for future development the specific factors a jury might consider in reaching a decision. For an individual case, counsel would be permitted to argue the specific factors relevant to the determination of that case.

The Act does not eliminate the need to adopt an instruction defining the term "unreasonably dangerous." The Act incorporates verbatim the language contained in M.A.I. 25.04 that the jury must find the product in a defective condition "unreasonably dangerous" to the user. Courts should provide guidance to the jury so that they have a decisional framework in which to determine whether a product is unreasonably dangerous. Providing an instruction defining the term "unreasonably dangerous" also would effectuate the legislature's intent in passing the Act—to eliminate some of the uncertainty in Missouri's strict products liability law.

An important adjunct to defining the term "unreasonably dangerous" concerns the type of evidence admissible both to prove that the product was unreasonably dangerous as designed and to rebut plaintiff's proof. One such issue is state of the art evidence. Under the risk-utility standard, the plaintiff cannot introduce evidence of an alternative design which was not feasible at the time of manufacture. Similarly, a defendant should not be held to a state of the art that was not technologically feasible or knowable at the time the product was made.

To impose liability without reference to technological feasibility at the time of the product's manufacture would be to impose absolute liability.[94] Missouri law does not make the manufacturer absolutely liable for injuries caused by use of its products. Nevertheless, the supreme court in *Elmore v.*

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93. Parties should request this instruction to preserve the issue on appeal. "There is a duty to offer a clarifying or amplifying instruction where the litigant believes the situation is not clearly or sufficiently hypothesized." Keller v. International Harvester Corp., 648 S.W.2d 584, 590 (Mo. Ct. App. 1983).

94. *See generally Absolute Liability, supra* note 11, at 443-47. Missouri courts claim that a defendant is not absolutely liable for injuries caused by use of their product. *See supra* notes 9-12.

Owens-Illinois, Inc.,[95] held that "state of the art evidence has no bearing on the outcome of a strict liability claim."[96] This statement seems to hold a defendant absolutely liable for the sale of a defective product even where it was technologically impossible for the defendant to design and manufacture an alternative product which could provide the same utility more safely. However, a close reading of the case shows the court did not intend such an expansive interpretation.

The court did not specifically discuss the types of evidence which might be considered "state of the art" evidence. At least three types of evidence might be so classified: custom and practice evidence, evidence of what was technologically feasible, and evidence that discovery of the defect was technologically infeasible.[97] Custom and practice evidence relates to the standard of care followed by others in the industry in the design of similar products.[98] Technological feasibility is not concerned with the industry practice. It focuses upon whether, given the scientific conditions existing at the time of the product's manufacture and sale, one could have designed the product any differently to avoid the danger.[99] Impossibility of discovering the defect relates to whether the defendant or the industries could know that the danger existed.[100]

In *Elmore*, the defendants contended that under the state of the art at the time the product was manufactured, the company was not and could not have been aware of the product's danger.[101] The only issue before the court was the company's claim that the product could not be considered defective as designed in that its inability to know the danger precluded a finding of defective design. In this context, the court held that evidence of state of the art was irrelevant in a design defect case, explaining that "[t]he manufacturer's standard of care is irrelevant because it relates to the reasonableness of the manufacturer's design choice; fault is an irrelevant consideration on the issue of liability in the strict liability context."[102] The court did not discuss feasibility as an issue nor the admissibility of the excluded evidence on the issue of whether the product was being used in a reasonably anticipated use.[103] Thus,

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95. 673 S.W.2d 434 (Mo. 1984) (en banc).
96. *Id.* at 438.
97. *See generally Absolute Liability, supra* note 11, at 444.
98. *Id.* at 443-44; *see, e.g.*, Johnson v. Hannibal Mower Corp., 679 S.W.2d 884, 885-86 (Mo. Ct. App. 1985).
99. *Absolute Liability, supra* note 11, at 444.
100. *Id.*
101. 673 S.W.2d at 437.
102. *Id.* at 438.
103. *See, e.g.*, Adams v. Fuqua Indust., Inc., 820 F.2d 271 (8th Cir. 1987) (construing Missouri law) (reversing trial court for precluding defendant from introducing evidence of the infeasibility of alternative designs at time of product manufacture). In Johnson v. Hannibal Mower Corp., 679 S.W.2d 884, 885-86 (Mo. Ct. App. 1984), however, the court of appeals mistakenly applied *Elmore*. The court held that evidence relating to industry standards was not admissible to rebut plaintiff's evidence that the defendant's product was defective and unreasonably dangerous. *Id.* at 886.

The supreme court's decisions demonstrate that much of the evidence regarding

the *Elmore* court's prohibition on introduction of state of the art evidence should be limited to evidence relating to knowledge of the danger, not the feasibility of manufacturing an alternative design.[104]

This analysis is supported by *Nesselrode*. In *Nesselrode*, the defect in the product was shown by evidence of industry standards (custom and practice) existing at the time the product was manufactured.[105] Technological feasibility of alternative designs at the time of manufacture also provided proof of defect.[106] Plaintiff offered evidence of consumer expectation at the time of the product's sale regarding use of the product to show the product was unreasonably dangerous as sold.[107]

Under Missouri law, the jury must focus on the time the product was manufactured to determine whether it is in a defective condition unreasonably dangerous to the user.[108] One factor the jury may consider is the availability and feasibility of alternative designs at the time of the product's manufacture. A plaintiff should not be permitted to introduce evidence of alternative designs that were not technologically feasible at the time the product was manufactured.[109] Conversely, in rebuttal to plaintiff's claim that the product as

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the custom and practice of the industry and the technological impossibility of designing an alternative product is relevant to the unreasonable dangerousness of the product and to whether the plaintiff was using the product in a reasonably anticipated use. The evidence relates to the product's character or condition and to the foreseeable use of the product, not the foreseeability of harm. *See infra* notes 130-141 and accompanying text. The court recently explained in *Nesselrode*:

> Although the negligence-rooted concept of fault has little if any theoretical utility in the law of strict tort liability, proximate causation and *foreseeability* are concepts that factor into the calculus of liability in a strict tort liability action. Foreseeability, however is a determinant of use: it is not a determinant of harm.

707 S.W.2d at 375 n.4 (emphasis added). Thus, the evidence would be admissible as relating to the foreseeability of product use. Obviously, if it was the custom and practice to use a product a certain way, the foreseeability of an unintended or unknown use would be limited. The evidence would be admissible so that the jury could determine whether the plaintiff had met his burden on foreseeability of use.

104. The *Elmore* court's prohibition on admissibility of this evidence has been overruled by the Act in a case based on strict products liability failure to warn. *See infra* notes 126-29 and accompanying text.

105. 707 S.W.2d at 379-80.

106. *Id.*

107. *Id.*

108. *See supra* notes 61-71 and accompanying text.

109. Admissibility of post-accident changes in allegedly defective products or warnings might be admissible in strict products liability actions on the issue of technological feasibility. Missouri courts have not addressed the issue. *See, e.g.*, Keller v. International Harvester Corp., 648 S.W.2d 584, 588 n.2 (Mo. Ct. App. 1983); Tennis v. General Motors Corp., 625 S.W.2d 218, 232 (Mo. Ct. App. 1981). Courts should not allow a plaintiff to introduce any evidence of post-accident changes unless the changes were sufficiently near in time so as to provide an inference of feasibility at the time of the product's manufacture and sale. In addition, the changes should be related to the causal defect.

designed was unreasonably dangerous, a defendant may introduce evidence that alternative designs were not technologically feasible at the time the product was manufactured and sold.

The Act recognizes that this type of evidence is admissible. The Act defines state of the art evidence—consistent with *Elmore*—to mean that the dangerous nature of the product was not known and could not reasonably have been discovered at the time the product was placed into the stream of commerce.[110] The Task Force specifically states in its section relating to state of the art evidence that the proposed change is not intended to affect the feasibility defense.[111] Thus, courts should continue to preclude a plaintiff from introducing evidence of alternative designs technologically unavailable at the time of the product's manufacture and sale. Courts should allow defendants to introduce evidence that alternative designs were not technologically feasible.

2. Failure to Warn

In Missouri, a plaintiff can bring his failure to warn case under a theory of negligence[112] or under the theory of strict products liability.[113] Under the

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A good example of this limitation is Roth v. Black & Decker U.S. Inc., 737 F.2d 779, 782 n.2 (8th Cir. 1984) (decided under Fed. R. Evid. 407). The product injuring plaintiff was manufactured in 1975. In 1974, the company designed a modification which was not incorporated in the product until 1976. The court found the evidence of design change admissible on the issue of whether alternative safer designs were technologically feasible at the time of the product's sale in 1975.

110. The Act provides:

> 1. As used in this section, "state of the art means that the dangerous nature of the product was not known and could not reasonably be discovered at the time the product was placed in the stream of commerce.
> 2. The state of the art shall be a complete defense and relevant evidence only in an action based upon strict liability for failure to warn of the dangerous condition of a product. This defense shall be pleaded as an affirmative defense and the party asserting it shall have the burden of proof.
> ***
> 4. This section shall not be construed to permit or prohibit evidence of feasibility in products liability claims.

MO. REV. STAT. § 537.764 (Supp. 1987).

111. *Id.* The Task Force explained that evidence of feasibility was already recognized as a defense under Missouri law and that this section was not intended to affect that defense. "This recommendation [regarding admissibility of state of the art evidence as defined in [MO. REV. STAT. § 537.764 (Supp. 1987)] does not apply to use of evidence in strict liability cases based on alleged manufacturing or design defects because the defense of feasibility is available." Final Report *supra* note 46, at 40.

112. Morris v. Shell Oil Co., 467 S.W.2d 39, 42 (Mo. 1971) (adopting the RESTATEMENT (SECOND) OF TORTS § 388 (1965) model of negligent failure to warn); *accord* Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371, 383 (Mo. 1986) (en banc). The RESTATEMENT (SECOND) OF TORTS § 388 (1965) provides:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable

former, knowledge is a relevant consideration.[114] Under the latter, liability may be imposed without regard to the defendant's knowledge of the danger.[115]

In a failure to warn case brought under strict products liability, a defendant is liable if the product is "unreasonably dangerous [at the time of sale] when put to a use without knowledge of its characteristics" and "the defendant did not give adequate warning of the danger." Unlike the design defect case, the issue relating to "unreasonable danger" in the context of the failure to warn case focuses on the user. If a user with knowledge of the danger can use the product safely, it is not unreasonably dangerous if an adequate warning communicating such danger is given.[116] Conversely, if a user without knowledge of the danger cannot use the product safely, the product is unreasonably dangerous if it is not accompanied by warnings that "effectively communicate to the consumer or user the dangers that inhere in the product during normal use and the dangerous consequences that will result from foreseeable misuse or abnormal use of the product."[117]

Thus, a jury cannot find both that the product was defectively designed

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use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

113. Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d at 383; Duke v. Gulf & Western Mfg. Co., 660 S.W.2d at 418; Rogers v. Toro Mfg. Co., 522 S.W.2d 632, 638 (Mo. Ct. App. 1975); *see also* Racer v. Utterman, 629 S.W.2d at 393-95 (need to provide warnings for unavoidably unsafe products).

114. *Nesselrode*, 707 S.W.2d at 383. *Accord* Hill v. Air Shields, Inc., 721 S.W.2d 112, 117 (Mo. Ct. App. 1986).

115. *Id.*

116. *See, e.g.*, Wilson v. Lockwood, 711 S.W.2d 545, 549 (Mo. Ct. App. 1986) (entering directed verdict for manufacturer on failure to warn claim). It must also be emphasized that the user's knowledge need not be acquired from a warning given by the manufacturer or seller. If the plaintiff independently knows or should have known of the dangers associated with use of the product, the defendant does not have a duty to warn. *E.g.*, Duke v. Gulf & Western Mfg. Co., 660 S.W.2d 404, 418 (Mo. Ct. App. 1983) (no duty exists to warn of common dangers of which one already knows or may reasonably be expected to know); Grady v. American Optical Corp., 702 S.W.2d 911, 915 (Mo. Ct. App. 1985); *cf.* Shine v. Southwestern Bell Telephone Co., 737 S.W.2d 203, 205 (Mo. Ct. App. 1987) (no duty to warn in negligence action "of the existence of a condition to one who has actual knowledge thereof as the law will not require the performance of a useless act. . . . One is not entitled to a warning of that which is already known to him"). There also is no duty to warn of open and obvious dangers. *E.g.*, Grady v. American Optical Corp., 702 S.W.2d 911 (Mo. Ct. App. 1985); Haines v. Powermatic Houdaille, Inc., 661 F.2d 94, 96 n.1 (8th Cir. 1981) (per curiam) (construing Missouri law).

117. *See* Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371, 382 (Mo. 1986) (en banc).

and that the defendant failed to warn. The theory of failure to warn assumes the product would not have been unreasonably dangerous if an adequate warning had been given.[118] Failure to provide the warning does not make the product defective in design; it only means that the product was unreasonably dangerous when put to a use without knowledge of the characteristics. Accordingly, parties should be aware that a verdict finding both a defective design and failure to warn is inconsistent.[119] They should seek clarification from the jury to preserve the issue for appeal.

Even if a warning is given, a product may be unreasonably dangerous if the given warning was inadequate. A plaintiff may introduce expert testimony that the warning was inadequate and that the product, therefore, was unreasonably dangerous.[120] Whether or not a given warning is adequate depends on its location, its language and how it may or may not impress the average user.[121]

In *Nesselrode*, the supreme court extended the *Elmore* court's prohibition on introduction of "state of the art" evidence to the failure to warn case litigated under a theory of strict products liability.[122] The court held that the

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118. In a case involving an unavoidably unsafe product, the warning must fully and adequately apprise the user of the dangers. A user may be injured when using the unavoidably unsafe product, but his knowledge of the dangers precludes recovery. He in essence voluntarily assumes the dangers of using the product once he has been apprised of the dangers and the manner in which to minimize them.

119. *But see* Lewis v. Envirotech Corp., 674 S.W.2d 105 (Mo. Ct. App. 1984). In *Lewis*, the court of appeals stated:

> Under MAI 25.04 the jury could have found that the Flex Check Valve was defectively designed because the outlet gasket was unsufficient to withstand leakage. Under MAI 25.05, the jury could have found that defendants failed to give an adequate warning of this condition. Neither of these two theories requires proof of a state of fact that would necessarily disprove a state of fact necessary to support the other. The evidence presented at trial was sufficient to support the giving of both instructions. Nor was there an inconsistency between the theories presented.

Id. at 112.

The court failed to recognize the basic premise of a failure to warn case: with a warning the product can be used safely. There is no evidence in this case that the product would have been used safely with a warning. Rather, the product was still defectively designed because the outlet gasket was insufficiently designed. Giving a warning about the "defective design" would not allow the plaintiff to use the product safely: the plaintiff could only have one choice—not to use the product at all. *Lewis* is a good example of how courts sometimes misapprehend the nature of a failure to warn case when counsel do not identify the inconsistency for the court.

120. In Tennis v. General Motors Corp., 625 S.W.2d 218 (Mo. Ct. App. 1981), the court held that an engineering psychologist's testimony on the efficiency of communications and the manner in which people perceive and understand certain signs, warnings and similar communications in a failure to warn case was properly the subject of expert testimony. *Id.* at 226 (citing Bristol-Myers Co. v. Gonzales, 548 S.W.2d 416, 431-33 (Tex. Civ. App. 1976), *rev'd on other grounds*, 561 S.W.2d 801 (Tex. 1978)).

121. *Id.* at 226.

122. 707 S.W.2d at 383.

pivotal concerns in a failure to warn case based on strict products liability are: (1) whether the product is unreasonably dangerous when put to normal use without proper warnings, and (2) whether adequate warnings or any warnings at all were given.[123] The defendant would be liable even if he could not have known of the danger at the time the product was manufactured and sold. The court reaffirmed "the principle that strict tort liability is not predicated on the presence of fault or the existence of knowledge."[124]

The defendant need not accompany the product with the warning at the time of sale to avoid liability. M.A.I. 25.05 only requires that the defendant give an adequate warning. It does not state when the adequate warning must be given. Thus, a defendant may subsequently remedy the unreasonable danger created by the failure to accompany the product with a warning by providing a warning to the user or consumer at a later date. If the adequate warning is subsequently given, the product cannot be unreasonably dangerous.[125]

The Act fundamentally will change this analysis. Under the Act, a defendant may plead and prove that at the time of sale it did not and could not have known of the danger causing the plaintiff's injury.[126] The Task Force rejected the *Elmore* and *Nesselrode* courts' analysis, reasoning that defendants should not be placed in the incredulous position of being liable for failing to warn of dangers about which they could not have possibly known.[127] The Task Force concluded that strict products liability's function of spreading costs of injuries associated with defective products should not be pursued where the danger causing the injury could not have been discovered.[128] When a defendant proves that the danger could not have been known at the time of manufacture and sale, defendant prevails.[129]

D. *Reasonably Anticipated Use*

In the formative years of strict products liability, confusion surfaced on the "use" issue in that some courts formulated the phrase as "intended use" while others employed "reasonably anticipated use." For example, in *Keener*,

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123. *Id.* at 389.

124. *Id.* at 383 (citing Elmore v. Owen-Illinois, Inc., 673 S.W.2d at 438).

125. An issue which has not been discussed by a Missouri court is whether a product which *is* defectively designed but for which a remedy notice has been sent by the manufacturer can be considered defectively designed if the plaintiff does not obtain the remedy offered. In that case, the better analysis would be to consider the product defectively designed, because as sold it was unreasonably dangerous and could not be used safely. The failure of the plaintiff to obtain the offered remedy should be considered as a separate cause of the plaintiff's injury. The jury would then consider whether the plaintiff's failure to obtain the offered remedy was the cause of the injury or whether the design defect was the cause of the injury.

126. *See supra* note 110.

127. Final Report, *supra* note 46, at 41.

128. *Id.*

129. *See supra* note 10.

the supreme court held that a plaintiff's burden included a showing that the allegedly defective product was used in a way intended by the manufacturer.[130] This subjective standard quickly disappeared when courts held that reasonably foreseeable misuse or abnormal handling would not bar a strict products liability claim.[131]

There are two facets of the "reasonably anticipated use" requirement. First, the "unreasonably dangerous" requirement and analysis is based on the reasonably anticipated use of the product. Plaintiff must prove the product is in a defective condition unreasonably dangerous *when put to a reasonably anticipated use.* Second, a plaintiff must prove he was using a product in a reasonably anticipated use at the time of the accident before he can recover.[132] What constitutes a reasonably anticipated or foreseeable use depends on an objective standard, not the knowledge of a particular defendant.[133] Nevertheless, the concept of foreseeability requires proof that the use was objectively foreseeable *at the time* the product was manufactured or sold.[134] To require a

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130. 445 S.W.2d at 365. This subjective measurement is also found in the RESTATEMENT (SECOND) OF TORTS § 402A comment h (1965) which states that an injury resulting from "abnormal handling" will not make a seller liable.

131. In Higgins v. Paul Hardeman, Inc., 457 S.W.2d 943, 948 (Mo. Ct. App. 1970), the court held that the term "reasonably foreseeable use" included foreseeable misuse. Since *Higgins*, courts have consistently found that "misuse" or "abnormal use" may be reasonably foreseeable. *See, e.g.*, Vanskike v. ACF Indus., Inc. 665 F.2d 188, 195 (8th Cir. 1981) (construing Missouri law); Hoppe v. Midwest Conveyor Co., 485 F.2d 1196, 1200-01 (8th Cir. 1973) (construing Missouri law); Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371, 381 (Mo. 1986) (en banc); Jarrell v. Fort Worth Steel & Mfg. Co., 666 S.W.2d 828, 836 (Mo. Ct. App. 1984); Duke v. Gulf & Western Mfg. Co., 660 S.W.2d 404, 414 (Mo. Ct. App. 1983); Baker v. International Harvester Co., 660 S.W.2d 21, 23 (Mo. Ct. App. 1983); Crysts v. Ford Motor Co., 571 S.W.2d 683, 688 (Mo. Ct. App. 1978); Rogers v. Toro Mfg. Co., 522 S.W.2d 632, 638 (Mo. Ct. App. 1975). One must carefully distinguish a situation in which the plaintiff knows or should have known that he was misusing or abnormally using the product. In those instances, the plaintiff is barred from recovery by voluntarily and knowingly encountering a known danger. *See, e.g.*, Lippard v. Houdaille Indus., Inc., 715 S.W.2d 491, 493-94 (Mo. 1986) (en banc); Lewis v. Bucyrus-Erie, Inc., 622 S.W.2d 920, 927 n.7 (Mo. 1981) (en banc); Means v. Sears, Roebuck & Co., 550 S.W.2d 780, 787 n.6 (Mo. 1977) (en banc); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362, 365 (Mo. 1969); Baker v. International Harvester Co., 660 S.W.2d 21, 23 (Mo. 1969); Baker v. International Harvester Co., 660 S.W.2d 21, 23 (Mo. Ct. App. 1983). This theory is comparable to assumption of the risk.

The Act eliminates this defense. *See infra* notes 211-14 and accompanying text. Although eliminating the contributory fault defense, the Act will allow a manufacturer to argue that the plaintiff was not using the product in a manner "intended" by the manufacturer. This will become an affirmative defense to be pleaded and proven by the defendant, although it will not be a complete defense. *See infra* notes 217-18 and accompanying text.

132. *See supra* note 21.

133. *Nesselrode*, 707 S.W.2d at 381.

134. *See, e.g., id.* at 375 n.4. Although the standard is what was objectively foreseeable, a plaintiff may introduce evidence of what the individual defendant knew to meet this burden. In Blevins v. Cushman Motors, 551 S.W.2d 602, 613 (Mo. 1977) (en

seller to anticipate uses which could *not* be reasonably anticipated at the time of the product's manufacture and sale would be to impose absolute liability.[135]

The Missouri Supreme Court did not impose absolute liability by adopting strict products liability; it merely excised the concept of foreseeability of *harm* (or reasonable care) from the jury's consideration.[136] *Elmore* held that "state of the art" evidence relating to the ability to know of danger or harm was not relevant in a strict products liability case.[137] It did not hold that evidence of custom and practice or evidence of feasibility at the time of manufacture and sale is irrelevant where such evidence relates to the objective foreseeability of use.[138]

Courts should allow both parties to introduce custom and practice (industry standards) evidence and feasibility evidence on the issue of whether plaintiff was injured while using the product in a reasonably anticipated manner. Evidence of industry standards, government regulations and requirements, consumer expectations and other design criteria existing at the time of manufacture and sale are relevant—although not dispositive—to that inquiry. The jury should be given this information so it can determine whether the use could have been objectively foreseeable or anticipated at the time the product was manufactured and sold.

The Act will not change this analysis.[139] It incorporates the "reasonably anticipated use" requirement.[140] After July 1, 1987, a plaintiff still must prove the product was unreasonably dangerous when put to a reasonably anticipated use. That reasonably anticipated use must have been reasonably foreseeable at the time when the product was manufactured and sold.[141] This requirement continues to ensure that a transferor of a product is not held absolutely liable for injuries caused by unforeseeable uses of its products.

E. *Causation*

1. Identification of the Product Manufacturer

A necessary element of any strict products liability case is that plaintiff

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banc), for example, the supreme court held the trial court had properly admitted defendant's advertising as proof that the plaintiff was injured while using the product in a "reasonably anticipated use."

135. *See generally* 707 S.W.2d at 375-76, 380-81.

136. *Id.* at 375 & n.4.

137. *See Elmore*, 673 S.W.2d at 438; *Nesselrode*, 707 S.W.2d at 383.

138. *See generally Nesselrode*, 707 S.W.2d at 379-81 (court discusses this type of evidence as proof of defect and on the foreseeability of use).

139. Of course, in a failure to warn case after the Act's effective date, a defendant also may plead and prove that he could not have known of the danger or harm at the time of the product's manufacture or sale. *See supra* notes 126-29 and accompanying text.

140. *See supra* note 18.

141. A plaintiff may still be able to proceed on some post-sale negligence theory if courts were to adopt such a theory.

prove the defendant's product proximately caused his injury. The Missouri Supreme Court in *Zafft v. Eli Lilly & Co.*,[142] recently reaffirmed that the plaintiff must establish some causal relationship between the defendant and the injury producing agent before he may recover under the theory of strict products liability.[143] In *Zafft*, plaintiffs sought to recover for injuries allegedly caused by *in utero* exposure to DES absent proof identifying the particular manufacturer of the DES taken by their mothers. Plaintiffs argued that the proof of causation should be relaxed by adoption of one of four theories already adopted by other courts: alternative liability, concert of action, industry-wide liability or market-share liability.[144]

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142. 676 S.W.2d 241 (Mo. 1984) (en banc).

143. *Id.* at 244 *passim.*

144. Each of these theories shift to the defendant the burden of proving that its product did not cause the plaintiff's injury. The theory of alternative liability is concisely distilled in the RESTATEMENT (SECOND) OF TORTS § 433B(3)(1965):

> Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

In the classic case of Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (en banc), each hunter who negligently shot in plaintiff's direction was required to prove that his bullet did not cause the injury. Failing such proof, defendants were jointly and severally liable. *Id.* at 86, 199 P.2d at 4. The California Supreme Court reasoned that both defendants were wrongdoers, both were negligent toward the plaintiff, and that it would be unfair to require plaintiff to identify the defendant responsible for the injury. *Id.* Under those circumstances, the court stated, a defendant is ordinarily in a far better position to determine whether he caused the injury.

This theory creates a presumption that each defendant was the legal cause of the injury and shifts the burden of persuasion. *See, e.g.*, Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1016 (D.S.C. 1981); Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 599, 607 P.2d 924, 929, 163 Cal. Rptr. 132, 136, *cert. denied*, 449 U.S. 912 (1980); Annotation, *Injury Caused by One of Several Defendants*, 5 A.L.R.2D 98 (1948). The presumption can be justified on the ground that all possible tortfeasors are joined, thereby insuring a 100% probability of causation collectively. *See* Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 986 (1978). Nevertheless, the plaintiff must prove both that *each* defendant *acted tortiously* and that the harm *resulted* from the conduct of some one of them. W. PROSSER & W. KEETON, LAW OF TORTS § 41, at 263-72 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 433B comment g (1965). *See, e.g.*, Shunk v. Bosworth, 334 F.2d 309, 312 (6th Cir. 1964); Wetzel v. Eaton Corp., 62 F.R.D. 22, 30 (D. Minn. 1973); Garcia v. Joseph Vince & Co., 84 Cal. App. 3d 868, 875, 148 Cal. Rptr. 843, 847 (1978). The doctrine has been applied *only* where defendants' tortious conduct was substantially similar. RESTATEMENT (SECOND) OF TORTS § 433B comment h (1965); *see also* Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (O.S.C. 1981). The *Zafft* court rejected this theory because all potential tortfeasors were not before the court. *Zafft*, 676 S.W.2d at 244.

The concert of action theory holds a defendant liable for a plaintiff's injury where two elements are established. First, the defendant and the others have an agreement to perform the act or achieve the particular result. Second, each particular actor charged with responsibility for the action must have proceeded tortiously. W. PROSSER & W. KEETON, LAW OF TORTS § 46, at 323 (5th ed. 1984); *see* RESTATEMENT (SECOND) OF TORTS § 876 (1977). Agreement between defendants can be proven two ways. Plaintiff

While acknowledging the seemingly compelling reasons for adopting novel theories of liability which relax the causation requirement, the court rejected plaintiffs' argument on public policy grounds.

> To shift the burden of proof on causation to respondents substantially alters the existing rights and liabilities of the litigants. There is insufficient justification at this time to support abandonment of so fundamental a concept of tort law as the requirement that a plaintiff prove, at a minimum, some nexus between wrongdoing and injury.[145]

The court concluded the plaintiff must "establish a causal relationship between the defendants and the injury-producing agent as a precondition to maintenance of their causes of action."[146]

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can prove the existence of an explicit agreement and joint action among defendants; or he can submit evidence of defendants' parallel behavior sufficient to support an inference of tacit agreement or cooperation. *See id.* Even if defendants have expressly or tacitly agreed to perform some act, "mere common plan, design, or even express agreement is not enough for liability in itself; there must be acts of a tortious character in carrying it into execution." RESTATEMENT (SECOND) OF TORTS § 876 comment b (1977). The case in which a bystander is injured by a car involved in a drag race is the typical application of this theory. *See, e.g.*, Lemons v. Kelly, 239 Or. 354, 397 P.2d 784 (1964); Skipper v. Hartley, 242 S.C. 221, 130 S.E.2d 486 (1963). Plaintiffs attempt to apply these cases to strict products liability cases by arguing that the defendants either expressly or tacitly jointly designed, tested, marketed, sold, or obtained government approval of their products. The *Zafft* court rejected this theory in the DES case because the element of agreement or cooperation was lacking. *Zafft*, 676 S.W.2d at 245.

The industry-wide liability theory suggested but not adopted in Hall v. E.I. Dupont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972) would hold all defendants in an industry liable for a plaintiff's injury simply because it had adhered to an industry-wide standard of safety. Adherence to this safety standard would constitute the tortious conduct. This theory has not been adopted by any court because it would make manufacturers of a product absolutely liable for injuries produced by their product. Unlike the concert of action theory, plaintiff is not required to demonstrate an express or tacit agreement; he is required to prove only an inadequate industry standard. The supreme court rejected this theory in *Zafft* because there was no evidence of delegating authority for safety standards to a trade association. *Zafft*, 676 S.W.2d at 245.

The market-share liability theory is a hybrid of the alternative liability theory. Unlike alternative liability, all possible defendants are not required to be joined in a market-share liability case, if manufacturers of a "substantial share" of the market are joined. *See Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. Market share liability also discards joint and several liability and adopts *pro rata* apportionment based on the respective defendants' share of the market. *Id.* If a defendant can prove his product could not have caused the plaintiff's injury, it will not be liable for any damages regardless of its share of the market. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. To utilize this theory, plaintiffs must demonstrate that defendants produce fungible goods from identical formula. *Id.*, at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144. The Missouri Supreme Court rejected this theory because of the inherent risk that the actual wrongdoer is not among the named defendants and that those joined are exposed to liability greater than their responsibility. *Zafft*, 676 S.W.2d at 246.

145. 676 S.W.2d at 247 (citation omitted).

146. *Id.* The supreme court explained that Missouri law does not guarantee relief to every deserving plaintiff.

The Act does not change this requirement. It states that the plaintiff's injury must directly result from the foreseeable and reasonably anticipated use of the defendant's defective unreasonably dangerous product. Thus, in any strict products liability action, both before and after the Act's effective date, a plaintiff must prove a nexus between the defendant's product and the injury.

2. Proximate Cause and the Substantial Factor Test

If the plaintiff establishes that nexus, he must prove that the defendant's product proximately caused his injury. To prove a product proximately caused his injury, a plaintiff must show that the defendant's defective product (or failure to warn) was a substantial contributing factor producing the injury. In *Jackson v. Ray Kruse Construction Co.*,[147] the supreme court explained that Missouri follows "the substantial factor test of causation."[148] Under this test, an alleged tortfeasor's conduct or product must be "a substantial factor" in contributing to the plaintiff's injury before it is either a "cause in fact" or "legal cause" of the injury.[149] This test also applies in strict products liability cases.[150]

In *Nesselrode v. Executive Beechcraft, Inc.*,[151] the supreme court held in a products liability case that "[p]roving proximate cause . . . is a fundamental burden that must be met."[152] The court explained that the defective product or failure to warn must be a "substantial factor" contributing to the injury before it is a cause in fact or legal cause of the plaintiff's injury."[153] *Nesselrode* affirms that the plaintiff must prove that the allegedly defective product was a substantial factor, not merely a contributing factor, in causing the injury before it can be a legal cause of the plaintiff's injury.

This requirement comports with the *Zafft* court's analysis. The *Zafft* court explained that a defendant's conduct or product cannot be a proximate cause (or substantial factor) of the plaintiff's injury if the plaintiff cannot prove that the cause for which the defendant would be liable produced the result:

> If the injury may have resulted from one of two causes, for one of which, and not the other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result; and, if the evidence leaves it to conjecture, the plaintiff must fail in his action.

Id. at 246 (quoting Warner v. St. Louis & M.R.R. Co., 178 Mo. 125, 134, 77 S.W. 67, 70 (1903)).

147. 708 S.W.2d 664 (Mo. 1986) (en banc).

148. *Id.* at 669 (citing Ricketts v. Kansas City Stock Yards Co., 484 S.W.2d 216, 221 (Mo. 1972) (en banc) and Todd v. Watson, 501 S.W.2d 48, 52 (Mo. 1973)).

149. *Jackson*, 708 S.W.2d at 669 n.6.

150. "Causation is an element of products liability cases just as it is of negligence cases, and so the cases just cited [involving products liability cases] are pertinent." *Jackson*, 708 S.W.2d at 669.

151. 707 S.W.2d 371 (Mo. 1986) (en banc).

152. *Id.* at 381.

153. *Id.*

> If the injury may have resulted from one of two causes, for one of which, and not the other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result; and, if the evidence leaves it to conjecture, the plaintiff must fail in his action.[154]

Thus, to be a proximate cause of the plaintiff's injury, the defendant's product must have been a substantial contributing factor in producing the plaintiff's injury.

This is an extremely significant requirement in toxic chemical and similar cases involving allegations that the defendant's product combined with another cause to produce the plaintiff's injury (*i.e.*, they were concurrent causes).[155] For example, in some cases a doctor will opine that a chemical a defendant manufactured and sold was a substantial contributing factor causing the plaintiff's injury. Upon closer examination, one discovers that the doctor's testimony is based on epidemiological (statistical) studies that exposure to the chemical and to other potential independent causes of the injury increases the likelihood that the an individual will contract whatever disease the plaintiff has. The doctor will admit that each potential cause could independently produce the plaintiff's disease or injury and that he cannot say that any one of the causes in this case was the actual injury producing agent. He will admit that he does not have diagnostic criteria, other than the plaintiff's exposure to the chemical and the statistical studies, for his conclusion that the defendant's product was a substantial contributing factor causing the plaintiff's injury. In those cases, the court must carefully consider excluding the doctor's testimony, because it is based on likelihood—and would allow the jury to engage in speculation and conjecture—that the defendant's product was a substantial factor contributing to cause the plaintiff's injury.[156]

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154. 676 S.W.2d at 246 (quoting Warner v. St. Louis & M.R.R. Co., 178 Mo. 125, 134, 77 S.W. 67, 70 (1903)); *see also* Hills v. Ozark Border Elec. Coop., 710 S.W.2d 338, 341 (Mo. Ct. App. 1986) (plaintiff did not establish submissible case because plaintiff made no attempt to introduce evidence eliminating other causes which could have caused the injury).

155. For a complete discussion of concurrent causation *see infra* notes 163-82 and accompanying text.

156. In an analogous situation, the plaintiffs in Bennett v. Mallinckrodt, Inc., 698 S.W.2d 854, 866 (Mo. Ct. App. 1985), sought to recover for the enhanced risk of developing cancer as a result of exposure to toxic chemicals. The court held that damages for enhanced risk based on mere mathematical probabilities are speculative and cannot be recovered. In Hahn v. McDowell, 349 S.W.2d 479 (Mo. Ct. App. 1961), the plaintiff attempted to recover damages for cancer which might develop in an area where he had suffered burn scars. The court of appeals held that the experts' testimony was improper, because the consequence of developing cancer was pure speculation. "Consequences which are contingent, speculative, or merely possible are not proper to be considered by the jury in ascertaining the damages, for it would be plainly unjust to compel one to pay damages for results that may or may not ensue and which are merely problematical." *Id.* at 482. The court of appeals explained:

> In an action to recover damages for personal injuries, testimony of experts as to the future consequences which are expected to follow . . . must be such as

In a failure to warn case, a plaintiff need not establish with absolute certainty that the existence of a warning would have prevented his injury to avoid a directed verdict. Rather, he may establish a *prima facie* case by proving that the defendant failed to warn or that warnings given were inadequate. A rebuttable presumption arises that an adequate warning would have been heeded.[157] In the absence of compelling evidence that the absence of a warning did not cause the injury, the causation question is left to the jury.[158] However, if the defendant produces evidence that warnings were given, a manufacturer may reasonably assume that they will be read and heeded.[159] If the plaintiff does not produce evidence rebutting that presumption, the court should direct a verdict for the defendant.

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in the ordinary course of nature, are reasonably certain to ensue. It is not enough for the doctor to testify to the possibility of a certain result; his testimony should show that it is reasonably certain to follow the injury.

Id.; *cf.* Allison v. Sverdrup & Parcel & Assoc., Inc., 738 S.W.2d 440, 456 (Mo. Ct. App. 1987) ("an inference is a logical *a priori* conclusion drawn by reason from proven or admitted facts. It is more than, and cannot be predicated on, mere surmise or conjecture. It is not a possibility that a thing could have happened or an idea founded on the probability that a thing may have occurred."); Howard v. Kysor Indus. Corp., 729 S.W.2d 603, 606 (Mo. Ct. App. 1987) (quoting W. Prosser & W. Keeton, The Law of Torts § 41, at 241 (4th ed. 1971) in negligence case) (reversing plaintiff's verdict and entering judgment for defendant because plaintiff failed to introduce evidence which "affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result." The court explained "[a] mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.").

Testimony by a doctor or other expert based upon statistical studies that exposure to a defendant's product increases the possibility of contracting the plaintiff's disease should be excluded for the same reason. The doctor cannot testify that exposure to the defendant's product produced the injury. All he can say is that there is a likelihood that it produced the injury. More is required before a doctor can testify about what *caused* a plaintiff's disease or injury.

157. Hill v. Air Shields, Inc., 721 S.W.2d 112, 119 (Mo. Ct. App. 1986); Duke v. Gulf & Western Mfg. Co., 660 S.W.2d 404, 419 (Mo. Ct. App. 1983). Both *Hill* and *Duke* relied on the RESTATEMENT (SECOND) OF TORTS § 402A (1965) for this proposition. Comment j states that where a warning is given, the seller may reasonably assume that it will be read and heeded. *Hill* and *Duke* held that the converse is also true: where no warning is given, one may assume that had an adequate warning been given it would have been read and heeded. *Hill*, 721 S.W.2d at 119; *Duke*, 660 S.W.2d at 419; *see also* Racer v. Utterman, 629 S.W.2d 387, 394 (Mo. Ct. App. 1981), *cert. denied sub nom.*, Racer v. Johnson & Johnson, 459 U.S. 803 (1982) ("In failure-to-warn cases generally, certainty that the existence of the warning would have prevented the injury is not required. In the absence of compelling evidence establishing that the absence of a warning did not cause the injury the causation question becomes one for the jury."); *accord* Jackson v. Ray Kruse Constr. Co., 708 S.W.2d 664, 668 (Mo. 1986) (en banc) ("In a 'failure to warn' case, it is not necessary to show with certainty that the warning would have prevented the casualty.").

158. *Racer*, 629 S.W.2d at 394.

159. Restatement (Second) of Torts § 402A comment j (1965).

To determine whether a defendant's allegedly defective product (or the failure to warn) was a substantial contributing factor in causing a plaintiff's injury, the jury must be permitted to consider evidence of other causes of the plaintiff's injury. This evidence would include the plaintiff's conduct and any other defendant's conduct. The conduct of any nondefendant, including the employer, causing or contributing to the injury must also be introduced. Finally, other factors not involving human conduct such as weather conditions in an automobile accident must be introduced so that the jury can determine whether the defendant's allegedly defective product (or failure to warn) was a substantial factor in causing the plaintiff's injury.

3. Distinguishing Proximate Causation from Comparative Fault

The supreme court's decision in *Lippard v. Houdaille Industries, Inc.*[160] does not change this analysis. In *Lippard*, the supreme court held that *after* the jury determines a defendant's defective product was a substantial factor in causing the plaintiff's injury, the plaintiff's negligence may not be compared with the defendant's fault to reduce a plaintiff's recovery.[161] The court emphasized that a plaintiff's carelessness may nevertheless be introduced into evidence to show "that the product is not unreasonably dangerous, or that the alleged defects in a product *did not cause* the injury. . . ."[162] The *Lippard* court very carefully distinguished between use of evidence to argue that some other conduct, product or condition caused the plaintiff's injury and use of

160. 715 S.W.2d 491 (Mo. 1986) (en banc).

161. *Id.* at 493.

162. *Id.* (emphasis added). *Accord* Ponte v. Harley Davidson Motor Co., 732 S.W.2d 561, 562-63 (Mo. Ct. App. 1987) ("A plaintiff's contributory negligence is not appropriate for instruction. . . . It is also true that a defendant in a strict liability action may advance a different explanation of the sole cause of an injury, including a plaintiff's alleged carelessness or negligent conduct, to support its argument that the product is not defective or that the alleged defect did not cause the injury.") (citations omitted); Castle v. Modern Farm Equip. Co., 729 S.W.2d 650, 653 (Mo. Ct. App. 1987) ("The court in *Lippard* stated that a plaintiff's contributory negligence is not at issue in a strict liability case and should neither defeat nor diminish recovery. The court added however, that such negligence may be used as evidence that the product is not defective or to show the defects in the product did not cause the injury." (citations omitted); Love v. Deere & Co., 720 S.W.2d 786, 788 (Mo. Ct. App. 1986); Earll v. Consolidated Aluminum Corp., 714 S.W.2d 932, 935, 937 (Mo. Ct. App. 1986) (citing *Lippard*); *see also* Clark v. Sears, Roebuck & Co., 731 S.W.2d 469, 473 (Mo. Ct. App. 1987) (giving of comparative fault instruction not reversible error in strict liability case with verdict for defendant: "The jury never actually addresses apportionment of fault until it first makes a finding in favor of plaintiff.") (relying on Barnes v. Tools & Mach. Builders, Inc., 715 S.W.2d 518, 521 (Mo. 1986) (en banc)); Lawson v. Schumacher & Blum Chevrolet, Inc., 687 S.W.2d 947, 953 (Mo. Ct. App. 1985) (conduct of the user may become a superseding cause of damages in a products liability action). This use of evidence to prove a defect was not the cause of plaintiff's injury must not be confused with the contributory fault defense, which is eliminated by the Act. *See infra* notes 211-13 and accompanying text.

evidence through a comparative fault instruction to diminish the plaintiff's recovery after the jury determines the defendant's defective product was a substantial factor contributing to cause the plaintiff's injury. The former is permissible while the latter is not.

This basic distinction underlies all tort law. Before a defendant can be liable, its product must have been a legal cause of the plaintiff's injury. When there is more than one potential cause of the plaintiff's injury, Missouri law states that conduct must have been a "substantial factor" contributing to cause the plaintiff's injury before it is a "legal cause" of the injury. To determine whether the defendant's conduct caused the plaintiff's injury, other causes of the injury must be considered and evaluated by the jury in its deliberation. Without this evidence, the jury would receive a skewed view of reality and would not make an informed decision on whether the defendant's product was a substantial factor contributing to cause the plaintiff's injury.

This principle is best illustrated by example. Assume that the plaintiff was in a car wreck in which she had an alcohol level of .23 (more than twice the legally acceptable level), was driving one-hundred miles per hour in a twenty mile per hour zone and had fallen asleep at the wheel as the car was careening down the roadway. Immediately before the plaintiff's car crashed into a brick wall, a defect in the car's tire caused the tire to explode. At that same instant, the car smashed into the brick wall at one-hundred miles per hour and the plaintiff was severely injured. Although one might argue that the tire in some way contributed to cause the plaintiff's injury, a jury when given all the evidence surrounding the plaintiff's accident probably would decide that the defendant's defective product was not a "substantial factor" contributing to cause the plaintiff's injury and that the defendant was not liable for the plaintiff's injury. If the defendant were not permitted to introduce evidence of the plaintiff's conduct—in drinking to excess, in speeding and in falling asleep at the wheel, the jury would have no basis for concluding that anything other than the defective tire caused the plaintiff to crash into the wall. This result would be an obvious injustice.

4. Concurrent Causation and Apportionment of Damages Between Distinct Causes

Missouri recognizes the theory of concurrent causation. This theory applies when a plaintiff can prove that more than one defendants' conduct was a substantial factor contributing to cause his injury.

> [W]here the concurrent or successive negligent acts or omissions of two or more persons, although acting independently of each other, are, in combination, the direct and proximate cause of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury, even though his act alone might not have caused the entire injury, or the same damage might have resulted from the act of the other tort-feasor, and the injured person may at his option or election institute suit for the resulting damages against any one or more of

such tortfeasors separately, or against any number or all of them jointly.[163]

The theory of concurrent causation also applies when two causes (one of which may be nontortious) inflict an indivisible injury.[164]

When tortfeasors cause an indivisible injury and there is no reasonable basis for determining in what proportion each contributed to cause the injury, they are jointly and severally liable for all damages resulting from the injury. The tortfeasors may seek contribution from one another and apportionment of liability based upon their relative fault.[165] "The two concurrent tortfeasors should be treated according to their respective fault or responsibility."[166] "The essential thing is the attempt to be fair as between persons subjected to a common legal liability."[167] Allocation is based on the fault conduct of the tortfeasors.

By contrast, when two causes inflict a single injury but there is a reasonable basis for determining the contribution of each cause to the injury, damages may be apportioned among the causes.[168] The rule applies regardless of the "fault" of any cause in contributing to the single injury. It applies where one of the causes is plaintiff's or another tortfeasor's conduct, whether it be negligent or innocent.[169] It applies where one of the causes does not involve tortious conduct such as the operation of a force of nature, or a pre-existing condition defendant has not caused.[170] The trial court must determine, as a matter of law, whether the harm is capable of apportionment.[171]

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163. Glick v. Ballentine Produce, Inc., 396 S.W.2d 609, 613 (Mo. 1965) (quoting Brantley v. Couch, 383 S.W.2d 307, 310 (Mo. Ct. App. 1964) (quoting 38 Am. Jur. *Negligence* § 257 at 946-47 (1941))); *see also* Koenig v. Babka, 682 S.W.2d 96, 99 (Mo. Ct. App. 1984) (the injured may recover damages from either or both tortfeasors and neither tortfeasor can interpose the defense that the prior or concurrent negligence of the other contributed to the injury).

164. *E.g.*, Beineke v. Terminal R.R. Ass'n, 340 S.W.2d 683, 688 (Mo. 1960).

165. Missouri Pac. R.R. Co. v. Whitehead & Kales Co., 566 S.W.2d 466 (Mo. 1978) (en banc); *see also infra* notes 183-206.

166. *Id.* at 472.

167. *Id.* at 469 (quoting Leflar, *Contribution and Indemnity Between Tortfeasors*, 51 U. PA. L. REV. 130, 137 (1932)).

168. RESTATEMENT (SECOND) OF TORTS § 433A(1)(b) (1965); *see also Glick*, 396 S.W.2d at 613 (concurrent or successive tortfeasors are responsible for all damages sustained as a result of the single injury if "it is impossible to determine in what proportion each contributed to the injury").

169. RESTATEMENT (SECOND) OF TORTS § 433A comment a (1965).

170. *Id.* at comment e. The RESTATEMENT (SECOND) OF TORTS gives the following example:

> 8. A suffers from arthritis in his arm, as a result of which he has a 50 percent disability in the use of the arm. He is struck by an automobile negligently driven by B, and the injury aggravates the arthritis so that he loses the use of the arm entirely. B may be held liable for 50 percent of the disability.

171. *Id.* § 434(1)(b). Apportionment will not be possible in two types of cases. First, there may be no logical way to apportion responsibility, such as when there is an indivisible injury. *Id.* § 433A(2). The Restatement examples are a plaintiff's death or a single wound. *Id.* at comment i. The principle of apportionment is based upon the abil-

The burden of proving that apportionment is appropriate rests on the party seeking it.[172] The principle inquiry in cases in which two or more causes inflict a single injury is whether there is a reasonable basis for determining in what proportion each contributed to the injury.

Apportionment of damages on this basis is extremely significant, because each tortfeasor is liable only for the damages it caused.[173] When there is a reasonable basis for determining the contribution of each cause to the plaintiff's injury, the jury finds that a tortfeasor caused only a portion of the injury. The tortfeasors are not liable for a *common* legal liability; they are *not* jointly and severally liable for all the damages plaintiff sustained.[174]

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ity to determine the contribution of each cause to the harm, not the relative fault of different tortfeasors. Thus, apportionment where there is an indivisible harm is not possible, although damages can be allocated based upon the relative fault of tortfeasors for the indivisible injury. *See infra* notes 183-206 and accompanying text.

Second, courts may use tort law policy to make one defendant liable for a portion of harm that might otherwise be allocated to another cause. This often occurs where an initial tortfeasor creates a chain of events in which the innocent plaintiff is injured by a subsequent tortfeasor. For example, in State *ex rel.* Baldwin v. Gaertner, 613 S.W.2d 638 (Mo. 1981) (en banc), the plaintiff was injured during a fall in a sandwich shop. The plaintiff suffered additional injury from the subsequent malpractice of the physician treating the plaintiff for the injury sustained in the fall. The court held that the physician was responsible only for the distinct harm he caused. As a matter of policy, the court held the initial tortfeasor, the negligent sandwich shop proprietor, responsible for the entire injury based upon a foreseeability analysis.

172. RESTATEMENT (SECOND) OF TORTS § 433B(2) (1965).

173. Missouri courts have applied this principle of apportionment in a somewhat analogous situation. If two causes result in distinct harms to the plaintiff, the damages for those harms are apportioned among the different causes. *Id.* § 433A(1)(a); State *ex rel.* Tarasch v. Crow, 622 S.W.2d 928, 931-35 (Mo. 1981) (en banc) (plaintiff caused injury to plaintiff's eye and doctor's malpractice caused loss of sight in plaintiff's other eye; the doctor is liable only for the damages caused by the loss of the plaintiff's sight as a result of the malpractice); State *ex rel.* Baldwin v. Gaertner, 613 S.W.2d 638, 640-41 (Mo. Ct. App. 1981) (recognizing distinction between concurrent tortfeasors apportionment of fault and apportionment of damages between distinct causes). For example, if a plaintiff develops cancer from radiation exposure and he injures his back in a fall at work, the harms are distinct: cancer and injured back. Though the plaintiff may feel overall pain and suffering or have shared medical expenses, it is possible to roughly allocate damages between the distinct harms. *See* RESTATEMENT (SECOND) OF TORTS § 433 (A) (1965) comment b; W. PROSSER & W. KEETON, LAW OF TORTS 317 (4th ed. 1971). Although analogous, apportionment of damages for distinct harms is analytically different than apportionment of damages for a single harm where there is a reasonable basis for determining the contribution of each cause to the harm.

174. In Martin v. Owens-Corning Fiberglass Corp., 528 A.2d 947 (Penn. 1987), the Pennsylvania Supreme Court applied these principles in reversing the jury's apportionment of damages between two causes of plaintiff's decreased lung function: his cigarette smoking and his exposure to asbestos products. The defendants had argued that there was a reasonable basis for determining the contribution of each cause to plaintiff's disability. However, the defendant's expert witnesses testified that plaintiff's disability was *solely* the result of emphysema caused by cigarette smoking. The plaintiff's experts testified that plaintiff's disability was caused both by asbestosis, due to asbestos exposure, and emphysema, caused by plaintiff's cigarette smoking. Plaintiff's experts

In *Polk v. Ford Motor Co.*,[175] the Eighth Circuit used this type of analysis to apportion damages between causes. In *Polk*, Thomas Polk was driving a 1970 Ford Maverick at approximately forty-five miles per hour on the interstate. His passenger was Demple Martin. Another car driven in the same direction at ninety to one-hundred miles per hour struck the Maverick in the rear, causing it to jump over a curb and strike a concrete retaining wall dividing the eastbound and westbound lanes. The Maverick rebounded from the

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opined that both were significant causes of the plaintiff's injury and that they could not determine in what proportion each cause contributed to plaintiff's disability. One of plaintiff's experts testified:

> I can't separate these two diseases for you in terms of percentage. My opinion is that both play a significant role in this man's disability, but I have no way of equating them or breaking them down. I can't tell you that asbestos contributed 48% and emphysema 52%, I don't know how to do that. There is no way I know of to separate these two diseases which are so closely intertwined.
>
> I believe that both of them exist to a significant degree and they are both significant factors in this man's disability. That is the best I can do with that.

Martin, 528 A.2d at 950.

Another testified:

> It is not possible for me to separate out the relative contribution of cigarette smoking and asbestos from the cause of his obstruction pulmonary disease and the cause of his total and permanent disability. Both factors are important in producing the effect and the pulmonary disability that he has. It is not possible to separate out what fraction of his lung disease is due to cigarette smoking, what factor, what fraction is due to asbestosis.

Id.

The supreme court reversed on the ground that "there was no evidence presented at trial upon which the trial court could properly submit the issue of apportionment to the jury." *Id.* at 948. The jury "was provided no guidance in determining the relative contributions of asbestos exposure and cigarette smoking to appellant's disability." *Id.* at 950.

The basis for reversal is significant. The supreme court reversed only because the jury had not been given any guidance in determining the relative contributions of asbestos exposure and cigarette smoking to the plaintiff's disability. If the defendants' experts had testified that asbestos exposure was not a significant factor contributing to cause plaintiff's injury; but, in any event, that asbestos exposure did not contribute to cause more than 10% of his disability, the jury arguably would have had some guidance in apportioning damages. The supreme court based its reversal on this lack of proof, not the inapplicability of the theory.

Justice McDermott's concurring opinion succinctly makes this point:

> The Majority Opinion stands for a single proposition, i.e., under the facts and circumstances of this case there was not enough evidence to submit the issue of apportionment to the jury. . . . [I]t should not be interpreted as precluding the defendants in this case from introducing new evidence of decedent's negligence, nor precluding a jury from returning a lesser verdict if the evidence would support such.

Id. at 951. (McDermott, J., concurring).

175. 529 F.2d 259 (8th Cir. 1976) (construing Missouri law); *see also* Cryts v. Ford Motor Co., 571 S.W.2d 683, 687 (Mo. Ct. App. 1978) (citing *Polk* and holding a manufacturer liable for injuries shown to have been enhanced by defective product in course of accident brought about by independent cause).

retaining wall, overturned, and slid on its roof approximately 100 feet before coming to rest. The roof supports collapsed and the car burst into flames. Martin was pinned in the Maverick and burned to death.

The plaintiff brought suit for Martin's wrongful death. Plaintiff alleged that the Maverick was defective and unreasonably dangerous because it had a flange-mounted fuel tank more likely to explode on impact than other feasible alternatives. Plaintiff claimed that Ford should be liable for the "enhanced injuries" caused by the defective unreasonably dangerous Maverick. The court agreed and held:

> [U]nder Missouri law a manufacturer may be held liable for those injuries shown to have been caused or enhanced by a defective condition of a product which was being used in a manner reasonably anticipated *in the course of* or following an initial accident brought about by some independent cause.[176]

The court observed that Ford was not a joint tortfeasor with the negligent driver for all damages occurring before the fire. The court explained that Ford was liable "only for the *enhanced* injuries. . . ."[177] The court approved the instruction allowing the jury to determine what injuries were suffered before the car caught fire and what injuries were sustained after the fire.[178]

Polk involved successive tortfeasors, and the jury was asked to determine what injuries occurred before the fire and what injuries occurred after the fire as a result of the independent causes (the driver's negligence and the defective product). *Polk* did not involve a single injury for which there was a reasonable basis for determining in what proportion each of several causes contributed to the injury. However, *Polk* supports an argument that a jury should be allowed to determine in what proportion each cause contributed to the plaintiff's injury. There is no difference between the "enhanced injury" doctrine which requires the jury to determine how much of the plaintiff's injury was enhanced by the defective product and apportionment of damages between contributing causes where there is a reasonable basis for apportionment.[179]

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176. *Polk*, 529 F.2d at 266 (emphasis added).

177. *Id.* at 268 (emphasis in original).

178. *Id.*

179. *See also* State *ex rel.* Retherford v. Corcoran, 643 S.W.2d 844, 846 (Mo. Ct. App. 1982) (plaintiff involved in multiple accidents; court holds that each defendant "has liability for, and only liability for, the injuries sustained by plaintiff as a result of that defendant's accident"; the difficulty of proof "does not create joint liability for these independent and unrelated torts: the defendants are not concurrent tortfeasors).

Other Missouri cases discussing the principle have occurred in factual situations in which there is no reasonable basis for apportioning damages. For example, in Glick v. Ballentine Produce, Inc., 396 S.W.2d 609 (Mo. 1965), plaintiff's husband was killed as a result of the conduct of successive tortfeasors. The first defendant collided with the deceased's car. As a result of the collision, the deceased was thrown from his car onto the pavement. Subsequently, the second defendant ran over the deceased while he was lying on the pavement. The supreme court held that under this set of facts, the defendants were jointly and severally liable for the indivisible injury, the deceased's death.

In Brantley v. Couch, 383 S.W.2d 307 (Mo. Ct. App. 1964), the plaintiff stopped her car at a stoplight when it changed from green to red. The first defendant's car

One must introduce evidence at trial which will allow the jury to apportion damages. An expert's testimony that a rough percentage can be assigned to each cause for the part it contributed to the plaintiff's injury would be sufficient. Sufficient evidence must be introduced to give the jury guidance in determining in what proportion each cause contributed to the injury. The judge should submit a special interrogatory in which the jury allocates a percentage to each cause to apportion damages.[180]

The Act does not address this issue, nor does it change proof of causation as a prerequisite to recovery.[181] The plaintiff must prove his injury directly resulted from the defective unreasonably dangerous condition of the product or because of a failure to warn. As recognized by the Task Force, one purpose of strict products liability is to spread the risk of injury to the defendant whose product actually caused the plaintiff's injury. To the extent that one cause of a plaintiff's injury is not conduct for which the defendant is responsible and there is a reasonable basis for apportioning damages, those damages for which the defendant is not responsible should not be allocated to that defendant.[182]

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struck the plaintiff's car in the rear while the plaintiff was stopped at the red light. Immediately thereafter, the second defendant ran into the first defendant's car, causing the first defendant's car to hit the plaintiff's car again. The plaintiff sustained a whiplash. The court held that there was no reasonable basis for apportioning damages between the causes and that each defendant was liable to the plaintiff for her injury.

However, under the theory of comparative indemnity adopted in *Whitehead & Kales*, defendants may seek contribution from one another based upon their relative fault. *See infra* notes 183-206 and accompanying text.

180. This type of apportionment is theoretically quite different from apportionment based on fault. The egregiousness of conduct is not important to the inquiry. The effect of the cause in producing the injury becomes the central inquiry. By contrast, allocation of damages based upon fault does not determine the effect of each cause in producing the injury. It seeks to allocate damages based upon the degree of fault of each tortfeasor, or the egregiousness of the tortfeasor's conduct. Defendants therefore should stress that they do not seek to circumvent the decision in Lippard v. Houdaille Indus., Inc., 715 S.W.2d 491 (Mo. 1986) (en banc), and that they are not asking to have the jury apportion fault to the plaintiff for his contributory negligence.

For example, a jury may find that a defendant's defective product caused 90% of the plaintiff's injury and that the plaintiff caused 10% of his injury. However, the same jury using comparative fault principles may decide that the defendant was only 50% at fault and that the plaintiff was 50% at fault for the plaintiff's injury. *Cf.* Missouri Pac. R.R. Co. v. Whitehead & Kales Co., 566 S.W.2d 466, 468-69 (Mo. 1978) (en banc) (discussing reasons for denial of contribution to intentional wrongdoers). The jury might reason that a defendant not knowing that its product was defective unreasonably dangerous at the time of manufacture is not as much at fault as the plaintiff who continued to use the product without a mask after experiencing respiratory problems. Because the fault concept incorporates degrees of egregiousness, the jury could find that the less responsible cause of an injury had the greater fault in producing the injury. Requesting an instruction that percentages be assessed to each cause for its effect in producing the injury avoids that problem.

181. *See supra* note 18.

182. The Task Force Report indicates that joint and several liability should be maintained where the causes are concurrent, *i.e.*, they create an indivisible injury. It does not address the issue of apportioning damages among independent causes of a

There is no valid public policy under the theory of strict products liability for spreading to a defendant the risk of paying damages for injury which it did not cause.

IV. Comparative Indemnity, Comparative Fault and Contributory Fault

In *Missouri Pacific Railroad Company v. Whitehead & Kales Company*,[183] the supreme court held that concurrent tortfeasors had the substantive right to obtain contribution from one another based upon their relative fault for the plaintiff's injury.[184] The court reasoned that "[a] principled right to indemnity should rest on relative responsibility and should be determined by the facts as applied to that issue."[185] The right to contribution rectifies the unjust enrichment that occurs when one tortfeasor discharges the liability of a joint tortfeasor.[186] Nevertheless, the defendants are jointly and severally liable for all plaintiff's damages. If one of the defendants deemed responsible for the damages is unable to pay its share of contribution, the concurrent tortfeasors must pay that portion of the damages.

A defendant may obtain allocation of damages by filing a third party petition or by filing cross-claims.[187] Alternatively, he can file an action after the initial suit has been adjudicated to obtain contribution from a concurrent tortfeasor based on that tortfeasor's relative fault.[188] The court explained that a defendant's right to obtain contribution is not limited to the defendants named by plaintiff. "To limit any apportionment to those whom the plaintiff has chosen to sue and against whom judgment is rendered is an unartful and capricious policy, relying in excess upon the whim and wrath of a plaintiff before concurrent wrongdoers can share liability."[189]

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single injury for which there is a reasonable basis for apportioning responsibility to each cause for the damage it produced.

183. 566 S.W.2d 466 (Mo. 1978) (en banc).

184. *Id.* at 472; *see also* Safeway Stores, Inc. v. City of Raytown, 633 S.W.2d 727, 728 n.1 (Mo. 1982) (en banc) (substantive right).

185. *Id.*

186. Rowland v. Skaggs Co., 666 S.W.2d 770, 773 (Mo. 1984) (en banc).

187. *Id.* at 473. Fault is apportioned among those defendants at trial. Missouri courts have rejected invitations to change total fault apportionment. *Jensen v. ARA Services, Inc.*, 736 S.W.2d 374, 377 (Mo. 1987) (en banc); *Schiles v. Schaefer*, 710 S.W.2d 254, 276 (Mo. Ct. App. 1986). If the defendant settles, the effect of the settlement is controlled by Mo. Rev. Stat. § 537.060, not by the percentage of fault that would have been assigned to the settling defendant.

188. Safeway Stores, Inc. v. City of Raytown, 633 S.W.2d 727, 730-31 (Mo. 1982) (en banc). *But see* Johnston v. Lerwick, 738 S.W.2d 868, 873-74 (Mo. Ct. App. 1986) (Satz, J., dissenting) (distinguishing *Safeway Stores* by noting plaintiff recovered against defendant before *Whitehead & Kales* was decided; questioning whether third-party action now appropriate although conceding language of Rule 52.11 is permissive and not mandatory).

189. *Whitehead & Kales*, 566 S.W.2d at 473.

Before a defendant can obtain contribution from a concurrent tortfeasor based on relative fault, the plaintiff must have a claim against the concurrent tortfeasor for which he can recover damages. The supreme court has held that a defendant cannot obtain contribution from the plaintiff's employer, because the plaintiff cannot bring suit against his employer.[190] Similarly, the doctrine of parental immunity precludes comparison of a parent's relative fault in contributing to cause his or her child's injury.[191] Other than these limitations, the defendant can obtain contribution based upon the relative fault of the concurrent tortfeasor in causing plaintiff's damages.[192] The supreme court in *Gustafson v. Benda* extended the doctrine to include comparison of the plaintiff's fault.[193] The court explained that "our five years of experience with a limited application of comparative fault fully demonstrate that fairness and justice can best be achieved through a broader application of that doctrine."[194] The court noted that "[c]omparative fault affords practicing attorneys a less complex and far more effective method for representing the rights of their clients, either plaintiff or defendant."[195] To give the bar and litigants guidance, the supreme court held that courts in future cases should apply insofar as possible the doctrine of pure comparative fault in accordance with the Uniform Comparative Fault Act.[196]

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190. *See, e.g.*, State *ex rel.* Maryland Heights Concrete Contractors, Inc., v. Ferriss, 588 S.W.2d 489 (Mo. 1979) (en banc); *accord* Sweet v. Herman Bros., Inc., 688 S.W.2d 31 (Mo. Ct. App. 1985). In *Maryland Heights*, the court reasoned that the worker's compensation act operates to release the employer from all other liability. The court concluded without analysis—other than reciting the terms of the worker's compensation statute—that this immunity precludes reduction of the plaintiff's award by the employer's percentage of fault for causing plaintiff's injury.

The court should reconsider its position and limit the plaintiff's right to recover in accordance with the jury's finding of the respective percentages of fault as between all tortfeasors, even those immune from suit under common law principles. If the plaintiff had brought the action against the defendants immune from suit, the plaintiff would be precluded from recovery. The defendant which is not immune from suit should not be required to pay for the damages caused by the fault of the immune defendant. The plaintiff's ability to collect damages from the immune tortfeasor would not be impaired because plaintiff is not entitled to collect damages from that tortfeasor.

191. *See, e.g.*, Kendall v. Sears, Roebuck & Co., 634 S.W.2d 176, 179 (Mo. 1982) (en banc); Kohler v. Rockwell Int'l Corp., 600 S.W.2d 647 (Mo. Ct. App. 1980); *accord* Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983) (en banc). Of course, should the court overrule its application of the parental immunity doctrine, a defendant could obtain contribution based upon the relative fault of the parent.

192. MO. REV. STAT. § 537.060 (1986) allows contribution between tortfeasors.

193. 661 S.W.2d 11 (Mo. 1983) (en banc). Several years earlier, the court had refused to extend the doctrine to require a comparison of the plaintiff's fault. Steinem v. Strobel, 589 S.W.2d 293 (Mo. 1979) (en banc). The lesson to be learned is that parties should not assume the supreme court will automatically follow an earlier opinion. If conditions have changed, they should seek changes in the law.

194. 661 S.W.2d at 15.

195. *Id.*

196. *Id.* The Uniform Comparative Fault Act (1983) was appended to the *Gustafson* decision. *Gustafson*, 661 S.W.2d at 17-27.

Following *Gustafson*, courts understandably applied comparative fault principles to strict products liability cases.[197] Comparative fault increased the fairness of the tort system in that a tortfeasor was not held responsible for damages caused by the plaintiff's fault. Similarly, a plaintiff was not precluded from recovery for the damages for which a tortfeasor was at fault. Parties assumed that these principles should be and would be applied to cases based on strict products liability.

In a sharp retreat from the principles enunciated in *Gustafson*, the supreme court in *Lippard v. Houdaille Industries, Inc.*,[198] held that comparative fault did not allow a comparison of plaintiff's fault with the defendant's fault when the plaintiff sues that defendant under the theory of strict products liability.[199] The court reasoned that even a negligent plaintiff should be able to recover if the defective product is a legal cause of injury.[200] What the court did not explain is why it is fair to allow a negligent plaintiff to recover for the damages for which he was responsible in a strict products liability case but not in a case based on negligence.[201]

The court limited its decision to a case involving only one defendant sued under the theory of strict products liability. It noted that its holding had "nothing to do with the sharing of liability by defendants under principles first enunciated in . . . *Whitehead & Kales*. . . ."[202] *Lippard* does not affect a defendant's right to seek contribution from a concurrent tortfeasor based on the relative fault of the tortfeasor.[203] "The principles of fairness imbedded within [Missouri] law . . . [and which compelled] adoption of a system for the distribution of joint tort liability on the basis of relative fault" remain intact.[204] The only requirement would be that the concurrent tortfeasor be sub-

197. *E.g.*, Gearhart v. Uniden Corp., 781 F.2d 147 (8th Cir. 1986) (construing Missouri law).

198. 715 S.W.2d 491 (Mo. 1986) (en banc).

199. *Id.* at 493.

200. *Id.* The court carefully noted that the plaintiff's conduct was still admissible for purposes of arguing that the defendant's defective product was not the legal cause of the plaintiff's injury. *Id.; see also supra* notes 160-62 and accompanying text.

For whatever reason, the court did not recognize that comparative negligence does not preclude a plaintiff from recovering damages as does the common law doctrine of contributory negligence. Contributory negligence allowed a defendant to argue that a plaintiff should be precluded from *any* recovery regardless of whether the defendant's product was found to be defective unreasonably dangerous. Comparative negligence only reduces the plaintiff's recovery by the percentage of his fault for the damages; it does not preclude recovery of damages.

201. The court held that the principles of comparative fault enunciated in *Gustafson* still applied in a case based on negligence principles. *Lippard*, 715 S.W.2d at 492. Accordingly, a plaintiff should carefully weigh whether a case should be brought based on negligence principles.

202. *Id.* at 494 (citing *Whitehead & Kales*).

203. *E.g.*, Welkener v. Kirkwood Drug Store Co., 734 S.W.2d 233, 243 (Mo. Ct. App. 1987).

204. 566 S.W.2d at 474.

ject to liability to the plaintiff.[205]

In a case based solely on strict products liability, application of the *Whitehead & Kales* doctrine of comparative indemnity will not present a problem: none of the defendants would be permitted to seek a comparison of the plaintiff's fault. The jury will determine the relative fault of the defendants for the plaintiff's damages. A more difficult problem will arise in cases in which a defendant being sued under strict products liability seeks contribution from a concurrent tortfeasor under a negligence theory. In these circumstances, the negligent defendant will be permitted under *Gustafson* and *Lippard* to have plaintiff's recovery against him reduced by the plaintiff's percentage of fault for causing his damages. At the same time, *Lippard* precludes reduction of the plaintiff's recovery from the defendant sued under strict products liability.

Accordingly, a court should instruct the jury to determine the percentages of fault separately. The jury must be instructed first to determine the defendants' fault for the plaintiff's injury as if the plaintiff were not at fault for his injury. In a separate instruction, the jury will be told to compare the fault of the plaintiff and the negligent defendant. From these percentages, the court will determine the proper amount of contribution to which the tortfeasor sued under strict products liability would be entitled from the negligent tortfeasor.[206] Although this procedure appears disjointed, it alleviates potential

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205. *See supra* notes 190-192 and accompanying text.

206. If, for example, the jury determines that the plaintiff's damages are $100,000 and that each defendant is 50% at fault, each defendant would be required to pay $50,000 under a true comparative fault approach. After *Lippard*, however, this would not be the case. If one of the defendants 50% at fault was sued under negligence principles and the other under strict products liability, the negligent defendant would be entitled to seek a comparison of plaintiff's fault in causing the plaintiff's damages. The defendant sued under strict products liability would not be entitled to this comparison and cannot recover the full amount of contribution from the negligent tortfeasor to which he would be entitled in a true comparative fault approach.

Accordingly, the jury should be asked to separately compare the fault of the plaintiff as against the negligent defendant in causing the plaintiff's injury. In this case, if the jury found that as between the negligent defendant and the plaintiff, their relative fault was 60% to the negligent defendant and 40% to the plaintiff, the plaintiff would be entitled to recover only $60,000 from the negligent defendant. Under *Lippard*, however, the plaintiff is still entitled to recover the entire $100,000 from the defendant sued under strict products liability. In the action for contribution, therefore, the strict products liability defendant should not be entitled to recover from the negligent defendant the amounts that should be reduced for the plaintiff's fault. The negligent defendant should contribute only one-half of the $60,000 he would have had to pay as a concurrent tortfeasor. He would contribute $30,000 to the defendant sued under strict products liability. The defendant sued under strict products liability would be required to contribute $70,000.

The following formula makes this principle easy to apply:

A = tortfeasor sued under strict products liability.
B = tortfeasor impleaded under negligence theory.
C = plaintiff.

jury confusion and leaves to the judge the determination of the final allocation of responsibility between the concurrent tortfeasors.

Although *Lippard* eliminated comparative fault in a strict products liability case, it left intact the contributory fault defense.[207] The contributory fault defense bars recovery by a plaintiff where "he voluntarily and unreasonably exposed himself to a known danger."[208] This affirmative defense must be plead by the defendant.[209] To prevail, the defendant must prove (1) the user knew of and appreciated the danger of using the product, (2) the user voluntarily and unreasonably exposed himself to the danger, and (3) his conduct directly caused or contributed to cause any damage he may have sustained.[210] The defense must be distinguished from comparative fault because it relieves the defendant of liability in a strict products liability case.

The Act will greatly affect this analysis. First, it eliminates the contributory fault defense in strict products liability actions accruing after July 1, 1987.[211] Instead, the Act provides that "[t]he doctrine of pure comparative

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The jury first determines the relative fault of A and B.
A = 50%
B = 50%
Then, the jury determines the fault as between B and C.
B = 60%
C = 40%
The judge should then reduce the percentage of B's responsibility to A for contribution by multiplying the percentage of fault for which B is responsible to C.
50% x 60% = 30%
Thus, A must pay 70% of the damages to C and B must pay 30% of the damages.
Another example using different figures of fault will help illustrate the formula. First, the jury determines the relative fault of A and B for C's damages.
A = 30%
B = 70%
Then, the jury determines the fault as between B and C for C's damages.
B = 70%
C = 30%
Finally, the judge reduces the percentage of B's responsibility to A for contribution by multiplying the percentage of fault for which B is responsible to C.
70% x 70% = 49%
Thus, A must pay 51% of C's damages and B must pay only 49%.

207. *Lippard*, 715 S.W.2d at 493.

208. *Id.; see also* M.A.I. 32.23 (1981); McGowne v. Challenge-Cook Bros. Inc., 672 F.2d 652, 661 (8th Cir. 1982) (construing Missouri law); Collins v. B.F. Goodrich Co., 558 F.2d 908 (8th Cir. 1977) (construing Missouri law); Means v. Sears, Roebuck & Co., 550 S.W.2d 780, 787 n.6 (Mo. 1977) (en banc); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969); Lawson v., Schumacher & Blum Chevrolet, Inc., 687 S.W.2d 947, 953 (Mo. Ct. App. 1985).

209. *See, e.g.*, Jarrell v. Fort Worth Steel & Mfg. Co., 666 S.W.2d 828, 833 (Mo. Ct. App. 1984).

210. M.A.I. 32.23 (1981).

211. Section 36, H.B. 700 (codified as MO. REV. STAT. § 537.765 (Supp. 1987)). A defendant was never entitled to a contributory fault instruction in a negligence action. *See* Portman v. Sinclair Oil Co., 518 S.W.2d 625 (Mo. 1975).

fault shall apply. . . ."[212] Any fault chargeable to plaintiff shall diminish proportionately the amount awarded as compensatory damages but shall not bar recovery.[213] The Act defines and limits plaintiff's fault to the following:

> (1) the failure to use the product as reasonably anticipated by the manufacturer;
> (2) use of the product for a purpose not intended by the manufacturer;
> (3) use of the product with knowledge of a danger involved in such use with reasonable appreciation of the consequences and the voluntary and unreasonable exposure to said danger;
> (4) unreasonable failure to appreciate the danger involved in use of the product or the consequences thereof and the unreasonable exposure to said danger;
> (5) the failure to undertake the precautions a reasonably careful user of the product would take to protect himself against dangers which he would reasonably appreciate under the same or similar circumstances; or
> (6) the failure to mitigate damages.[214]

By defining "fault" as it has in the Act, the legislature significantly changed pre-existing law.

Under the Act, plaintiff must prove that he was using the product in a reasonably anticipated use before he can recover.[215] Failure of proof on this issue means that defendant prevails.[216] Thus, it is not clear what conduct the legislature intended for the jury to compare by including plaintiff's failure to use the product as reasonably anticipated as an element of fault. However, it must be stressed that the Act does not affect the plaintiff's burden of demonstrating that the product was in a defective condition unreasonably dangerous when put to a reasonably anticipated use.[217] The Act also requires that plaintiff demonstrate that the use to which he was putting the product at the time he was injured could have been reasonably anticipated by the manufacturer at the time of sale.

Significantly, the Act will allow the jury to compare the plaintiff's fault for using "the product for a purpose not intended by the manufacturer." Before the Act, the plaintiff's use of the product in a manner not intended by the manufacturer did not preclude recovery.[218] The Act will allow the defendant to argue that an unintended use constitutes fault reducing the plaintiff's recovery. This will be extremely important because it involves a subjective standard, not an objective one. The defendant should be entitled to introduce

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212. MO. REV. STAT. § 537.765 (Supp. 1987).
213. *Id.*
214. *Id.*
215. The definition of strict products liability and the elements of the submissible case require plaintiff to prove that the product was being used in a manner reasonably anticipated at the time of injury. *See supra* note 18; *see also* Final Report, *supra* note 46, at 31 (one element of a submissible case is that "the product was in fact being used in a reasonably anticipated manner" at the time of injury).
216. Final Report, *supra* note 46, at 31.
217. *See supra* notes 130-31.
218. *See supra* notes 130-31.

evidence relating to typical uses at the time of manufacture and sale (because intended use must be measured at the time the product was put into the stream of commerce). In addition, product advertising, owner's manuals discussing the proper use of the product, etc. will be relevant to this issue. This element of fault should be a powerful tool for defendants to use in establishing plaintiff's responsibility for his injury.

The third and fourth elements of fault under this section of the Act are essentially a codification of the contributory fault defense. However, a defendant cannot use the defense to bar recovery. A plaintiff's unreasonable exposure to the product after he should have known the danger will be compared with the defendant's fault to reduce plaintiff's recovery. One fault of the "contributory fault" defense which has been significantly changed is the plaintiff's appreciation of the danger. Under M.A.I. 32.23 and prior case law, the plaintiff subjectively had to appreciate the danger before the contributory fault defense was proven. Under the Act, a defendant need only prove that the plaintiff should reasonably have appreciated the danger. Rather than a subjective standard, the Act has incorporated an objective reasonable person standard for appreciation of danger.

The fifth element of the comparative fault defense under the Act is also significant, because it does not require that the plaintiff be aware of the danger to obtain comparison of his fault. It states that the plaintiff's "failure to undertake the precautions a reasonably careful user of the product would take to protect himself against danger which he would reasonably appreciate under the same or similar circumstances" constitutes fault. All that a defendant must prove is that others using the product as intended or reasonably anticipated would have used precautions or followed safety practices that would reduce the likelihood of injury. With that proof, even if the plaintiff did not recognize the danger, a defendant may obtain a comparison of fault.[219]

The final element, mitigation of damages, includes a broad range of proof. For example, failure to obtain surgery to reduce damages should be compared. Plaintiff's reasonableness in not having the surgery arguably would be irrelevant. The legislature did not state that it was the "unreasonable" failure to mitigate damages which can be compared. Thus, if there was any chance that surgery would have reduced the damages, a defendant can argue that plaintiff was at fault for not mitigating damages.[220] If a plaintiff cannot perform his

219. One should recognize that this does not eliminate the causation argument. If the plaintiff's injury would have been avoided if he had followed safety practices, his failure to use the practices becomes the cause of his injury. There is no fault to compare, because the defendant's product was not a legal cause of the injury.

220. Although a defendant theoretically can argue that a plaintiff failed to mitigate damages no matter how reasonable the plaintiff's conduct, a defendant should use common sense in making the argument. A jury will not believe that the plaintiff failed to mitigate damages if the defendant argues that the plaintiff should have undertaken a course of action to mitigate damages that any reasonable person would consider unreasonable conduct. The defendant should not make absurd arguments or he will lose his

previous job because of injury, proof that plaintiff could have performed some job to reduce his injury also will be admissible under this element of the comparative fault defense. Use of this section will only be limited by creative counsel's imagination.

The procedure for comparison of fault and determination of each defendant's responsibility for contribution will be greatly simplified. Because the Act allows a defendant sued under strict products liability to compare plaintiff's fault with his to reduce the amount of damages for which he is responsible, courts need only instruct the jury to make one comparison of the plaintiff's and all of the defendant's fault.

The Act also modifies the doctrine of joint and several liability if one tortfeasor's obligation for contribution is deemed "uncollectable."[221] If the jury finds that the plaintiff is not at fault for his injuries, the defendants remain jointly and severally liable regardless of whether one tortfeasor's obligation is uncollectable.[222] If the jury finds the plaintiff at fault for his injuries, the remaining defendants are not jointly and severally liable for the uncollectable tortfeasor's obligation.[223] The Act states that the courts "shall reallocate

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credibility with the jury.

221. *See* MO. REV. STAT. § 537.067 (Supp. 1987). Importantly, this section modifying joint and several liability applies to "all tort actions for damages" and is not limited to a products liability case. *Id.*

222. *Id.*

223. The Act sets out an elaborate procedure by which any moving party (probably a defendant because this section does not help a plaintiff) may obtain reallocation of an uncollectible defendant's equitable share or relative fault:

> 2. In all tort actions for damages in which fault is assessed to plaintiff the defendants shall be jointly and severally liable for the amount of the judgment rendered against such defendants except as follows:
> (1) In all such actions in which the trier of fact assesses a percentage of fault to the plaintiff, any party, including the plaintiff, may within thirty days of the date the verdict is rendered move for reallocation of any uncollectible amounts;
> (2) If such a motion is filed the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including the claimant at fault, according to their respective percentages of fault;
> (3) The party whose uncollectible amount is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment;
> (4) No amount shall be reallocated to any party whose assessed percentage of fault is less than the plaintiff's so as to increase that party's liability by more than a factor of two;
> (5) If such motion is filed, the parties may conduct discovery on the issue of collectibility prior to a hearing on such motion;
> (6) Any order of reallocation pursuant to this section shall be entered within one hundred twenty days after the date of filing such a motion for reallocation. If no such order is entered within that time, such motion shall be deemed to be overruled;
> (7) Proceedings on a motion for reallocation shall not operate to extend the

any uncollectable amount among the other parties, including a claimant at fault, according to their respective percentages of fault."[224] This provision re-

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time otherwise provided for post-trial motion or appeal on other issues.
MO. REV. STAT. § 537.067 (Supp. 1987).

This provision is essentially an enactment of the Uniform Comparative Fault Act § 2(d). There is one significant difference, however, in that no tortfeasor's liability may be increased by more than a factor of two. This means that the solvent tortfeasor cannot be required under the reallocation formula to pay more than double the amount in damages he would be required to pay before application of the formula.

A procedural trap of which litigants must be wary is that the section does not extend the time otherwise provided for post-trial motions or appeal on other issues. Yet, the Act allows a litigant to wait for 30 days before filing the motion for reallocation and gives the court an additional 120 days to decide the motion. This will create significant problems for the unwary, because the time for filing motions for new trial and the notice of appeal are much shorter.

Under MO. R. CIV. P. 78.04, a judgment is entered on the date of the verdict. A motion for new trial must be filed within 15 days of entry of judgment. MO. R. CIV. P. 78.04. If the motion for new trial is not decided within 90 days after the motion is denied, it is deemed denied and the judgment becomes final and appealable. MO. R. CIV. P. 78.06, 81.05. The litigant then has 10 days to file the Notice of Appeal. MO. R. CIV. P. 81.04. Thus, the Notice of Appeal would have to be filed long before the time the trial court must dispose of the motion for reallocation under this Act.

If no motion for new trial is filed, the judgment becomes final 30 days after the entry of judgment. MO. R. CIV. P. 81.05. The litigant seeking an appeal must file his Notice of Appeal within 10 days after the judgment becomes final. MO. R. CIV. P. 81.04. Again, the notice of appeal would have to be filed before the trial court has to dispose of the motion for reallocation.

These time periods must be followed even though the lower court has not decided the issue of reallocation. MO. REV. STAT. § 537.067 (Supp. 1987). Under MO. R. CIV. P. 81.05, all after-trial motions are deemed decided on the date that the motion for new trial is disposed of by decision or by application of the rule. Accordingly, litigants might argue for the sake of judicial efficiency and to ensure that they do not waive any issue on appeal that any undecided motion for reallocation should be deemed denied on the same date on which the motion for new trial is disposed. (The cautious appellant would not be penalized for filing a premature notice of appeal on the issue of reallocation. MO. R. CIV. P. 81.05(b)). If the appellant does not make this argument, or if he has appealed from the judgment rather than making a motion for new trial, he should seek to file an amended notice of appeal once the lower court by ruling or expiration of the 120 days denies any motion for reallocation. MO. REV. STAT. § 537.067 (Supp. 1987).

224. MO. REV. STAT. § 637.067 (Supp. 1987). Although the Act does not set out a formula to determine the amount for which each party would be responsible after reallocation, this section is quite simple in application. An example will make it easy to understand. Assume plaintiff's compensatory damages are $100,000 and the jury determined the parties' fault as follows:

A = plaintiff (50%) at fault.
B = defendant (25%) at fault.
C = defendant (25%) at fault whose obligation is uncollectible.

The court would order that C's equitable share be allocated between A and B by using the following formula:

$$\frac{\text{Percentage Responsibility of Solvent Party}}{\text{Sum of all Solvent Parties' Percentage Responsibility}}$$

quires a plaintiff responsible for a part of his damages to bear some of the risk of a tortfeasor's obligation being "uncollectible."[225]

The Act does not define the term, "uncollectible." Courts should look to a defendant's liability insurance to determine whether the defendant's equitable share is collectible. In cases in which a defendant does not have insurance, courts should determine whether defendant has assets subject to execution which, if liquidated, would satisfy defendant's obligation. If the defendant has sufficient assets, his equitable obligation would be considered collectible.[226]

A more difficult problem will occur in cases in which a defendant does not

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This results in reallocation as follows:

A's equitable share is increased by $16,666.67
(50/(50 + 25) - ⅔ of $25,000).

B's equitable share is increased by $8,333.33
(25/(50 + 25) - ⅓ of $25,000).

In actions accruing after the effective date of the Act, defendant B would be responsible for paying only $33,333.33. Its share would be increased by $8,333.33.

Another example using this formula will further illustrate its application. Assume that plaintiff's damages are $100,000 and the percentages of fault are determined as follows:

A = plaintiff (10%) at fault.
B = defendant (60%) at fault.
C = defendant (20%) at fault.
D = defendant (10%) at fault.

Assume that D is the party whose share is uncollectible. The court reallocates responsibility for D's equitable share as follows:

A's equitable share is increased $1,111
(10/(10 +60 + 20) = 1/9 x D's equitable share).

B's equitable share is increased $6,667
(60/(10 + 60 + 20) = ⅔ x D's equitable share).

C's equitable share is increased $2,222
(20/(10 + 60 + 20) = 2/9 x D's equitable share).

B would be required to pay $66,667. C would be required to pay $22,222.

225. *See* Final Report, *supra* note 46, at 37. A plaintiff should settle with a tortfeasor whose obligation the plaintiff believes will be uncollectible to avoid application of this section. A plaintiff should argue that the remaining defendants should be jointly and severally liable for his damages, regardless of the settling tortfeasor's relative fault in contributing to cause the plaintiff's injuries. Because of the public policy encouraging settlement of disputes, courts should adopt the plaintiff's argument.

However, courts should apply this section once a judgment has been rendered regardless of whether a plaintiff attempts to settle with a tortfeasor whose obligation is uncollectible. Application of the section after judgment will encourage the plaintiff to settle claims before trial and prevent the plaintiff from keeping a party in an action solely to avoid diversity jurisdiction.

226. The court should look at the defendant's present ability to satisfy his equitable share and not base its decision on contingent liability, *e.g.*, a defendant's potential liability in lawsuits not yet litigated to judgment or disposed of by settlement. If there is concern about the defendant's future ability to pay once the right to appeal has been exhausted, Missouri Rule of Civil Procedure 81.09 protects the other litigants by requiring the defendant to post a supersedeas bond "at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay. . . ." *Id.*

have sufficient assets and his liability insurance carrier denies coverage. If that denial is disputed, courts must decide whether to consider the defendant's equitable share uncollectible. Because the Act intends to spread the risk to both plaintiff and defendant for a defendant's uncollectible share, the court should consider the share uncollectible and reallocate responsibility among the remaining responsible parties. Each remaining party would be considered subrogated to the defendant's claim against the insurance carrier on the coverage dispute.[227] To the extent there are any claims for vexatious refusal to pay[228] or a tort claim for bad faith refusal to settle, the parties would also be considered subrogated to those claims.

Courts should allow any of the parties that became responsible for any defendant's equitable share to bring an action against the insurance carrier for the entire amount due. As in a wrongful death action, the claimant would be bringing the action on behalf of all those entitled to recover.[229] This approach would allow any party paying more than its equitable share an opportunity to obtain reimbursement. If more than one party files an action, the actions can be consolidated.[230] If one party files an action to recover, the other parties would have a right to intervene to protect their interest.[231]

V. PUNITIVE DAMAGES

In *Bhagvandoss v. Beiersdorf, Inc.*,[232] the Missouri Supreme Court determined that punitive damages may be awarded in an appropriate strict products liability action. But the test for punitive damages in a strict products liability case is difficult to meet.[233] There must be some element of outrage to justify punitive damages.[234] To obtain an award of punitive damages, plaintiff must demonstrate that defendant put a defective unreasonably dangerous

227. Subrogation is based on principles of justice and equity and is closely akin to the equitable principle of restitution and unjust enrichment. Cole v. Morris, 409 S.W.2d 668, 670 (Mo. 1966). It is a device to compel ultimate discharge of a debt due by the one in fairness who ought to pay it. *Id.* Under this theory, persons jointly and severally liable have a right to seek contribution. 83 C.J.S. *Subrogation* § 17 (1953). Courts should use this doctrine to allow parties required to pay more than their equitable share because of an insurance dispute to pursue the insolvent tortfeasor's insurance carrier.

228. MO. REV. STAT. §§ 375.296 (1968), 375.420 (Supp. 1987).

229. The courts should allow the party bringing the action to set off its attorneys fees and costs from any recovery before distributing the judgment amount among the parties.

230. MO. R. CIV. P. 66.01.

231. MO. R. CIV. P. 52.12.

232. 723 S.W.2d 392, 397-98 (1987) (en banc). The courts of appeal had earlier held that punitive damages in a strict products liability case could be submitted in an appropriate case. *E.g.*, Racer v. Utterman, 629 S.W.2d 387 (Mo. Ct. App. 1981), *cert. denied sub nom.*, Racer v. Johnson & Johnson, 459 U.S. 803 (1982); *see also* M.A.I. 10.04 (Supp. 1987).

233. *Racer*, 629 S.W.2d at 397.

234. *Id.*

product on the market *knowing* that it would cause the harm suffered by the plaintiff.[235] The relevant time frame is the defendant's knowledge at the time the product was placed on the market.[236]

After *Bhagvandoss*, courts should carefully scrutinize plaintiff's evidence before allowing a plaintiff to submit a punitive damages claim. Once the claim is submitted, the trial court must use strict scrutiny to ensure that the evidence supports the jury's punitive damages award.[237] Because *Bhagvandoss* empha-

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235. *See, e.g., Racer*, 629 S.W.2d at 396-97; *see also* M.A.I. 10.04 (Supp. 1987) (punitive damages may be awarded in a products liability action only if the defendant knew of the defect in the product and of the danger posed thereby at the time it sold the product; and if the defendant's conduct in nevertheless placing the product in the stream of commerce shows complete indifference to or conscious disregard for the safety of others); Lewis v. Envirotech Corp., 674 S.W.2d 105, 114 (Mo. Ct. App. 1984).

Plaintiffs often offer evidence of other accidents to prove a defendant's willfulness and wantonness. Before this evidence is admissible on the issue of punitive damages, courts must carefully scrutinize the circumstances of the other accidents to ensure they are substantially similar to the facts and circumstances of the pending case. *See supra* note 85. Moreover, if evidence is introduced on this issue, the trial court must limit the evidence to those accident reports received by the company (and received by a person in authority) before the date the product causing plaintiff's injury was manufactured and sold. *E.g.*, Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322, 1336 (8th Cir. 1985) (construing Missouri law); Lewy v. Remington Arms Co., 836 F.2d 1104, 1106-07 n.1 (8th Cir. 1988). A plaintiff must know it sold a defectively designed product before it is liable for punitive damages. M.A.I. 10.04 (1981); Bhagvandoss v. Beiersdorf, Inc., 723 S.W.2d 392, 397 (Mo. 1987) (en banc) (approving M.A.I. 10.04).

236. *Bhagvandoss*, 723 S.W.2d at 397. The court of appeals in *Racer* explained:

> Strict liability in tort imposes a duty on the manufacturer not to introduce into commerce an unreasonably dangerous product—whether the danger arises from defective manufacture, defective design, or failure to warn of danger. The breach of that duty occurs by the act of introducing such product into commerce. That is the only conduct which is relevant.

629 S.W.2d at 395; *see also* Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322, 1336 (8th Cir. 1985) (construing Missouri law) (evidence supporting an award of punitive damages must be based on evidence that defendant knew the product was dangerous at the time it was placed in the stream of commerce; "the district court abused its discretion in permitting appellees to argue [post-sale knowledge] in support of their claim for punitive damages").

237. The *Bhagvandoss* court emphasized that punitive damages awards had been set aside in numerous cases. *Bhagvandoss*, 723 S.W.2d at 397 & n.5. This statement obviously supports the proposition that courts should not hesitate to set aside a punitive damages award. One commentator noted that no award of punitive damages in a strict products liability case had survived intact through the appellate process. Chapter 47, PRODUCTS LIABILITY CLE (1987).

Another tool which the trial and appellate courts will have to ensure that the award of punitive damages is appropriate is the doctrine of remittitur. The Act provides that "[t]he doctrines of remittitur and additur, based on the trial judge's assessment of the totality of the surrounding circumstances, shall apply to punitive damages awards." Section 39.6, H.B. 700; *see also* MO. REV. STAT. § 537.068 (Supp. 1987). Because a movant might seek a reversal of the trial judge's denial of a motion for remittitur or additur, he should request that the trial court state on the record the

sized that the award of punitive damages in a strict products liability case is subject to a high standard, courts should instruct the jury that punitive damages may be awarded only after proof by "clear and convincing evidence." Use of this standard would ensure that the jury carefully scrutinizes the evidence before awarding punitive damages.[238]

The Act does not modify the basis for submission of punitive damages, the need to use strict scrutiny to ensure that plaintiff makes a submissible case for punitive damages, nor the necessity of instructing the jury on the clear and convincing evidence standard. The Act does change the procedure for determination of punitive damages. It states that the court shall conduct a bifurcated trial on the issue of the amount of punitive damages upon the motion of any party.[239] In the first stage of the bifurcated proceeding, the jury determines the defendant's liability for compensatory damages, the amount of compensatory damages, and the defendant's liability for punitive damages.[240] Only the amount of punitive damages is determined in the second stage of the bifurcated proceeding.[241]

This procedure will not alleviate a defendant's concern that plaintiff will prejudice the jury's determination of compensatory liability with evidence relevant only as to punitive damages liability. In fact, the procedure may benefit the plaintiff. A plaintiff will introduce the evidence relating to punitive damages liability in the first stage. This will allow him to bootstrap his proof of compensatory liability with the punitive damages evidence. In the second stage, the plaintiff may introduce the defendant's net worth and tell the jury that its only duty is to determine an amount of punitive damages which will punish the defendant and deter others from engaging in similar conduct.[242]

The Act will allow a defendant to file a post-trial motion requesting that any award of punitive damages be reduced by the court with amounts previously paid for punitive damages arising out of the same conduct.[243] The mo-

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circumstances on which it relied for denying the relief sought.

238. One commentator explained:

> The [clear and convincing evidence] standard helps to check the risks faced by manufacturers making daily good faith engineering decisions, and it reminds the Court and jury at every step to blow away the smoke and dust of the litigation battle to see if the stuff of truly flagrant conduct is there.

Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, U. CHI. L. REV. 1, 59 (1982).

239. Section 39, H.B. 700. *See also* MO. REV. STAT. § 510.264 (Supp. 1987).

240. *Id.*

241. *Id.*

242. The court, of course, will continue to scrutinize strictly any award of punitive damages as instructed by *Bhagvandoss*. It also will have the doctrine of remittitur available to reduce any improper award.

This Article does not discuss the constitutionality of awarding punitive damages against a defendant based on the goal of deterring others from engaging in similar conduct. There are strong arguments that this type of an award is unconstitutional.

243. Section 39.4, H.B. 700.

tion must be filed within the time allowed for filing a motion for new trial.[244] This provision was added to further the goals of punishment and deterrence without inflicting financial ruin on a defendant previously punished for the same conduct.[245] The provision recognizes that multiple punitive damages awards based on the same conduct will adversely affect the defendant's ability to pay future claimants and could bankrupt a defendant, thereby jeopardizing the jobs of thousands of employees and investors' investment in the defendant corporation.[246]

VI. CHOICE OF LAW

Missouri courts follow the Restatement (Second) of Conflicts section 145 (1971) "most significant contacts" test in determining the substantive law to be applied in strict products liability cases.[247] Courts consider all acts of the parties touching the transaction in relation to the several states involved and apply the law of the state having the most significant contacts.[248] The Act will not change this approach. It does not indicate which state's substantive law will apply. It modifies Missouri strict products liability law for cases accruing after July 1, 1987 should a court determine that Missouri substantive law applies.

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244. *Id.*

245. Final Report, *supra* note 46, at 39.

246. *See, e.g.*, Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 840 (2d Cir. 1967):

> A sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin.

247. This theory was adopted by the Missouri Supreme Court in Kennedy v. Dixon, 439 S.W.2d 173 (Mo. 1969) (en banc). *Accord* Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434, 436-37 (Mo. 1984) (en banc). Section 145 provides:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in Section 6.
>
> (2) Contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

248. *Kennedy*, 439 S.W.2d at 185 (quoting W.H. Barber Co. v. Hughes, 63 N.E.2d 417, 423 (Ind. 1945)).

VII. STATUTE OF LIMITATIONS

Under the Missouri statute of limitations, a plaintiff has five years after his claim for relief accrues to file his action.[249] "A cause of action accrues when and originates where damages are sustained and capable of ascertainment."[250] If a plaintiff does not have damages capable of ascertainment, the statute of limitations does not begin to run on his claim for relief.

In *Elmore*, the court ostensibly held that a plaintiff must know the cause of his injury before he has suffered damages capable of ascertainment.[251] In that case, the plaintiff had been exposed to asbestos-containing products from 1943 through 1976. As early as 1973 the plaintiff had shortness of breath and knew from reading union publications that long-term breathing of asbestos dust caused asbestosis.[252] The plaintiff, however, did not know until 1976 upon a physician's diagnosis that his condition was asbestosis. The *Elmore* court concluded that the plaintiff's cause of action did not accrue until the date of the diagnosis in 1976.[253] The court explained that "[i]t was not until such diagnosis was made that the character of the condition (asbestosis) and its cause (breathing asbestos dust) first "came together" for the plaintiff.[254]

The *Elmore* court did not consider the unreasonableness of the plaintiff's failure to determine the cause of his injury. Nonetheless, courts should hold that a plaintiff's cause of action accrues when a reasonable person should have determined the injury and cause of the injury. Although plaintiffs who could not reasonably have discovered their injury and its cause should not be precluded from pursuing a claim, the statute of limitations should operate to preclude a plaintiff from bringing an action more than five years after his damages were reasonably capable of ascertainment.

This approach follows earlier decisions by the Missouri Supreme Court and recognizes the public policy that statutes of limitation are intended to prevent open-ended liability. In *Jepson v. Stubbs*[255] the supreme court rejected a "discovery rule":

> In so suggesting [a discovery rule], professor Davis seeks to arrive at what he deems to be a more just result. However, to so construe the language of the existing (§ 516.100) would be to re-write the statute so as to establish a "discovery" rather than "capable of ascertainment" test in all instances to which the statutes of limitation are applicable. This is not what the legislature did and it is not for us to rewrite the statute to so provide.[256]

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249. MO. REV. STAT. § 516.120 (1978).
250. *Elmore*, 673 S.W.2d at 436.
251. 673 S.W.2d at 436.
252. One symptom of asbestosis is that it can cause shortness of breath.
253. 673 S.W.2d at 436.
254. *Id.*
255. 555 S.W.2d 307 (Mo. 1977) (en banc).
256. *Id.* at 313 (discussing Davis, "*Tort Liability and the Statutes of Limitation*," 33 MO. L. REV. 171, 192 (1968) in which the author suggests that "normal cannons of construction would not be offended if the phrase 'capable of ascertainment'

To read *Jepson* consistently with *Elmore*, courts should conclude that the Missouri Supreme Court has not adopted the subjective discovery rule but has instead adopted an objective reasonably capable of ascertainment standard.[257]

A critical issue in a strict product liability action is which state's statute of limitation applies. Missouri's "borrowing statute" controls which state's statute of limitation applies. It provides that "[w]henever a cause of action has been fully barred by the laws of the state, territory or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts in this state."[258] The Missouri Supreme Court held that the term "originated" in the statute should be accorded the meaning "accrued."[259] The court determined in *Dorris v. McClanahan* that this means the state where the plaintiff sustained damages capable of ascertainment is the state whose statute of limitations should apply.[260]

Before the supreme court's adoption of the most significant contacts test for determining which state's substantive law to apply, this interpretation of the borrowing statute was consistent with the legislature's intent. Missouri had followed the *lex loci delicti* rule in the choice of law to be applied in tort actions.[261] Under this rule, the law of the state where the tort was committed governed everything except procedure.[262] The action thus originated in the state whose substantive law would apply.

To prevent a party from forum shopping to find a forum with a favorable statute of limitation, the legislature passed the borrowing statute. Courts had previously held to the distinction between procedural issues and substantive issues: they applied the procedural laws (including the statutes of limitation) of the forum state and the substantive law of the state where the action originated (under the *lex loci* rule). The borrowing statute required the courts to apply both the substantive law and the statute of limitation of the state where the action originated.

The court's interpretation of the term "originated" in the borrowing statute seems to circumvent the intent of the legislature to require that the substantive law and the statute of limitations of the same state be applied. The plaintiff in *Dorris* had argued the court should use the most significant con-

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were construed to mean 'capable of ascertainment in the normal course of events by this particular plaintiff in the exercise of reasonable diligence.' ").

257. *But see* Renfroe v. Eli Lily & Co., 541 F. Supp. 805 (E.D. Mo.) *aff'd*, 686 F.2d 642 (8th Cir. 1982) (setting forth a two-pronged approach for determining accrual of causes of action under section 516.100: "[T]he present plaintiffs' claim did not arise or accrue until (1) the plaintiff suffered reasonably discoverable injuries and (2) the plaintiff knew, or in the exercise of reasonable diligence should have known, whichever first occurred, their injuries were caused by DES exposure.").

258. Mo. Rev. Stat. § 516.190 (1978).

259. *Elmore*, 673 S.W.2d at 436; Dorris v. McClanahan, 725 S.W.2d 870 (Mo. 1987) (en banc).

260. 725 S.W.2d at 871; *see also Elmore*, 673 S.W.2d at 436.

261. *Kennedy*, 439 S.W.2d at 180.

262. *Id.*

tacts test to determine whose statute of limitations would apply. The court rejected that approach, although it would result in applying the substantive law and statute of limitations of the same state. Instead, the court reasoned that "the Missouri legislature has enacted the borrowing statute which precludes a conflict of law question. . . ."[263] What the court failed to recognize is that a choice of law question was not required. Instead, interpretation of the term "originated" was what was at issue. The term originated could have been interpreted to apply the statute of limitations of the state whose substantive law applied.[264]

As a result of the court's interpretation of the borrowing statute, there will be anomalous results. For example, in *Elmore*, the court concluded that the cause of action originated in the state where the diagnosis occurred (Missouri).[265] Fortunately, the state where the diagnosis occurred was the same state whose substantive law applied under the most significant contacts test. However, it would have been just as likely that the plaintiff had flown to Mayo Institute in Minnesota for diagnosis of his condition. Under the court's interpretation of the borrowing statute, it would have applied Minnesota's statute of limitations even if that was plaintiff's only contact with the state.

The Act does not change the statute of limitations nor does it address the borrowing statute. Accordingly, courts will continue to apply prior law. If the courts do not reconsider the interpretation of the borrowing statute, the legislature should amend it to prevent the anomalous results which may occur as a result of the *Elmore* and *Dorris* decisions.

VIII. CONCLUSION

The Act represents a legislative attempt to alter the course of Missouri products liability law. The electorate and their duly-elected representatives perceived that products liability law made product manufacturers and sellers insurers for all injuries caused by use of their products. To refocus Missouri products liability law, the legislature statutorily mandated that the ability to know of a product's danger at the time of sale was relevant in a strict products liability case. The legislature declared that a plaintiff's fault for causing his injuries must be compared to diminish his recovery: a plaintiff must take some responsibility for his conduct. Joint and several liability was modified to require a responsible plaintiff to share some of the uncollectible defendant's equitable share.

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263. 725 S.W.2d at 871.

264. The Florida Supreme Court recently took this approach in Bates v. Cook, Inc., 509 So. 2d 1112 (1987). The court noted that the RESTATEMENT (SECOND) OF CONFLICTS § 142 (1986) supported this position. The court concluded "that the significant relationships test should be employed to decide in which state the cause of action 'arose.' The borrowing statute will only come into play if it is determined that the cause of action arose in another state." *Bates*, 509 So. 2d at 1115.

265. 673 S.W.2d at 436.

Courts should follow the legislature's lead. They should apply the Act and the common law to ensure that manufacturers and sellers are held accountable only for a plaintiff's injuries actually caused by a defective unreasonably dangerous product. Products liability law should be developed to compensate a plaintiff for injuries caused by a defective product, not for injury produced by another cause or produced by plaintiff's fault. Hopefully the comments and observations made in this Article will assist the courts in achieving these goals.